[redacted]

Supreme Court of the United States

[redacted]

No. [redacted] 51

A. LEO WEIL AND CHARLES H. WEIGEL, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & WEIGEL, PETITIONERS,

vs.

EDWARD H. STARR

[redacted]

[redacted]

[redacted]

[redacted]

(33,188)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 736

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT, SOUTHERN NEW YORK

Writ of Error

United States of America, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Edward M. Neary, Defendant in Error, Plaintiff below, and A. Leo Weil and Charles M. Thorp, Plaintiffs in Error, Defendants below, a manifest error hath happened, to the great damage of the said A. Leo Weil and Charles M. Thorp, as is said and appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 9th day of July, 1926, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit Court of Appeals for the Second Circuit may cause further [fol. 2] may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 10th day of June, in the year of our Lord one thousand nine hundred and twenty-six, and

of the Independence of the United States the one hundred and fiftieth.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. Jno C. Knox, U. S. District Judge.

[fol. 3] In Supreme Court of New York, County of New York

Trial desired in the County of New York

Edward M. Neary, Plaintiff,

against

A. Leo Weil and Charles M. Thorp, Doing Business under the Firm Name and Style of Weil & Thorp, Defendants

Summons

To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated City of New York, May 7th, 1921.

Guggenheimer, Untermeyer & Marshall, Plaintiff's Attorneys. Office and Post Office address: No. 120 Broadway, Borough of Manhattan, New York City.

[fol. 4] In Supreme Court of New York

[Title omitted]

Notice of Appearance

Sirs: Please to take notice that the defendant A. Leo Weil appears in this action, and that we are retained as

Attorneys for him therein, and demand that a copy of the Complaint and all papers in this action be served on us at our office, number 30 Broad Street, Borough of Manhattan, New York City.

Dated New York, May 26th, 1921.

Yours, &c., Crim & Wemple, Attorneys for Defendant Weil. Office and Post Office address: 30 Broad Street, Borough of Manhattan, New York City.

To Guggenheimer, Untermeyer & Marshall, Esqs., Plaintiff's Attorneys, 120 Broadway, New York City.

[fol. 5] In Supreme Court of New York

[Title omitted]

Complaint

The plaintiff above named complaining of the defendants herein, by Guggenheimer, Untermeyer & Marshall, his attorneys, alleges on information and belief:

First. At all the times hereinafter mentioned the defendants A. Leo Weil and Charles M. Thorp were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp. During all of said times Samuel Untermeyer, the plaintiff's assignor, was engaged in the practice of law at the City of New York.

Second. Prior to the month of August, 1917, the plaintiff's assignor had been retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pennsylvania, where he was engaged in business as a banker and in the operation of coal mines, to enable them to collect from the said Thompson [fol. 6] and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved and it was agreed in the interests of his creditors and especially of those represented by plaintiff's assignor, that the extensive properties of the said Thompson should be conserved so

that they might be applied equitably in payment of the claims of his creditors.

Third. The plaintiff's assignor, acting under instructions of the creditors by whom he had been retained and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. To that end he informed the defendants of his plans in that regard and retained them to conduct such bankruptcy proceedings under his supervision, upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand Dollars ($5,000).

Fourth. Upon the understanding and agreement aforesaid bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt and trustees of his estate were duly [fol. 7] appointed and the administration thereof proceeded, the defendants herein acting for plaintiff's assignor and the interests represented by him.

Fifth. In the course of the administration of the estate of the said Thompson various complications arose which prolonged the period of administration beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings and which rendered it necessary for the defendants to perform more extensive and laborious services than it was originally believed to be necessary in the administration of the said estate in bankruptcy. Recognizing that fact plaintiff's assignor and the defendants thereupon agreed that the compensation of the letter for services in said bankruptcy proceedings was not to be limited to the sum of $5,000 as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the defendants were to receive for the services

rendered by them out of such allowance as should eventually be made by the Court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.

Sixth. Pursuant to such arrangement the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision of plaintiff's assignor, for which an allowance was on or about September 20, 1920, made to them in said proceedings by the District Court of the United States for the Western District of [fol. 8] Pennsylvania, to be paid out of the estate of the bankrupt, of the sum of One hundred and forty thousand Dollars ($140,000) in payment for the services rendered by them in said proceedings, and on or about November 15, 1920, said sum of $140,000 was paid to the defendants by the Trustees in Bankruptcy of the said Thompson.

Seventh. On being informed of such payment to the defendants, plaintiff's assignor, recognizing the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $140,000 paid to the defendants as aforesaid was that the defendants should retain sixty per cent or Eighty-four thousand Dollars ($84,000) of the said sum, and that the remaining forty per cent or Fifty-six thousand Dollars ($56,000) were to be paid to him, and informed the defendants of his determination with respect to such division.

Eighth. Thereafter the defendants, although for a long time admitting and recognizing the rights of the plaintiff's assignor in the premises and seeking to induce him to make a larger allowance to them, refused to comply with the demands of the plaintiff's assignor that they pay over to him the said $56,000, and, although often requested to pay to him the said sum, have refused to pay the same or any part thereof and remain indebted therefor with interest from November 15, 1920.

Ninth. Prior to the commencement of this action plaintiff's assignor duly assigned and transferred to the plain- [fol. 9] tiff all of his right, title and interest in the cause

of action herein set forth, and the plaintiff is now the owner thereof.

Wherefore, the plaintiff demands judgment against the defendants for the sum of Fifty-six thousand Dollars ($56,000) with interest from November 15, 1920, besides the costs of this action.

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff. Office & Post Office address: 120 Broadway, Borough of Manhattan, New York City.

Duly sworn to by Edward M. Neary. Jurat omitted in printing.

[fol. 10] In Supreme Court of New York

[Title omitted]

Notice of Motion for Order of Removal

Please take notice, that upon the petition, and bond of A. Leo Weil, and the affidavit of John W. H. Crim, duly verified the 24th day of June, 1921, annexed hereto, and upon the Summons, Appearance and Complaint in this action, the undersigned will move this Court at a Special Term Part I to be held at the County Court House, Borough of Manhattan, New York City on the 30th day of June, 1921, at 10:15 o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order granting the defendant's petition for the removal of this cause as prayed, and for such other or further relief as may be just.

Dated New York, June 25th, 1921.

Crim & Wemple, Attorneys for Defendant A. Leo Weil. Office & P. O. address: No. 30 Broad Street, Borough of Manhattan, New York City.

To Messrs. Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff, No. 120 Broadway, New York City.

[fol. 11] In Supreme Court of New York

[Title omitted]

Petition for Removal

To the Honorable the Judges of the Supreme Court of the County and State of New York:

Your petitioner, A. Leo Weil, respectfully shows, that he is one of the defendants in the above entitled action; that the matter in dispute therein extends, exclusive of interest and costs, the sum and value of Three thousand ($3,000.00) Dollars.

Your petitioner further shows that the said suit is of a civil nature; that it is alleged in the Complaint that your petitioner and the defendant Charles M. Thorp, were retained to conduct bankruptcy proceedings under the supervision of plaintiff's assignor, Samuel Untermyer, against Josiah V. Thompson, who resided at Uniontown, Pennsylvania, and was engaged as a banker and in the operation of coal mines; and that thereupon such proceedings were had that on or about September 10th, 1917, the said Thompson [fol. 12] was duly adjudicated, trustees were appointed and the administration proceeded, the defendants acting for plaintiff's assignor and the interests represented by him. That in the course of the administration of the estate various complications arose which rendered it necessary for the defendants to perform more extensive services than was originally believed necessary in the administration of the estate in bankruptcy. That is was thereupon agreed that in lieu of the original compensation the said defendants were to receive out of the allowance made by the Court, such sum as was determined by the plaintiff's assignor to be just and equitable; that the Court allowed the defendant on or about September 20th, 1920, the sum of One hundred and forty thousand ($140,000.00) Dollars; that thereupon the plaintiff's assignor upon being informed of the payment of said allowance, determined that the defendant should retain sixty per cent. (60%) of the amount or Eighty-four thousand ($84,000.00) Dollars and that the remaining forty per cent. (40%) of Fifty-six thousand ($56,000.00) Dollars was to be paid to him; that defendants have refused to comply

to the demands of plaintiff's assignor, and that therefore plaintiff demands the amount above stated.

Your petitioner further shows that the said defendant your petitioner, was at the time of the commencement of this suit, and still is a citizen and resident of the State of Pennsylvania and a non-resident of the State of New York, and that the above named plaintiff's assignor, Samuel Untermyer, was at the time of the commencement of this suit, and still is a citizen and resident of the State of New York.

That the defendant, Charles M. Thorp, is a citizen and [fol. 13] resident of the State of Pennsylvania, but that neither the summons or other process herein was served upon him.

And there is a controversy which is wholly between citizens of different states, to wit: between A. Leo Weil, your petitioner, and the plaintiff's assignor, Samuel Untermyer.

Your petitioner offers herewith a bond with good and sufficient surety in the penal sum of Five hundred ($500.00) Dollars, conditioned for their entering in the United States District Court for the Southern District of New York on the first day of the next session of said Court, a copy of the record in this suit, and for paying all costs that may be awarded by said United States District Court, if said Court shall hold that the suit was wrongfully or improperly removed thereto.

That your petitioner has not answered, demurred or otherwise pleaded to the merits in this action, nor has the time of your petitioner as yet expired for so doing under the laws of the State of New York. That no other or previous petition or application has been made on behalf of your petitioner for the removal of this case to the United States District Court.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make an order of removal as required by law, and to accept the said sureties and bond and to cause the record in this case to be removed into the said United States District Court for the Southern District of New York, according to the statute in such case made and provided, and your petitioner will ever pray.

Dated New York, June 24th, 1921.

A. Leo Weil, per John W. H. Crim.

[fol. 14] *Duly sworn to by John W. H. Crim. Jurat omitted in printing.*

[fol. 15] In Supreme Court of New York

[Title omitted]

Order Granting Motion for Removal

The following papers number 1 to 7 read on this motion this 30th day of June, 1921.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-3
Filed Papers.....	4-7

Upon the foregoing papers this motion to remove this cause to the District Court of the United States for the Southern District of New York is granted on default. Bond approved.

V. M. D., J. S. C.

Dated June 30th, 1921.

[fol. 16] In United States District Court for the Southern District of New York

Edward M. Neary, Plaintiff,

against

A. Leo Weil and Charles M. Thorp, Doing Business under the Firm Name and Style of Weil & Thorp, Defendants

Answer of Defendant A. Leo Weil

The defendant A Leo Weil, by Crim & Wemple, his attorneys, answers the complaint herein as follows:

I. He admits the allegations contained in the First paragraph of the complaint, except that he denies that A. Leo Weil and Charles M. Thorp were copartners subsequent to November 30, 1920, and alleges that the firm of Weil & Thorp was dissolved as of the close of business on that day.

II. He admits the allegations contained in the Second paragraph of the complaint.

III. He admits the allegations contained in the Third paragraph of the complaint, except that he denies that the defendants were retained to conduct the bankruptcy proceedings referred to under the supervision of the plaintiff's assignor and denies that the defendants were retained to perform any services in said bankruptcy proceedings other [fol. 17] than to prepare and file the petition in bankruptcy and to take such proceedings therein as were necessary to obtain an adjudication in bankruptcy, and denies that the sum of five thousand dollars therein referred to was to cover any services except the proceedings aforesaid.

IV. Answering the allegations contained in the Fourth paragraph of the complaint he admits that bankruptcy proceedings were duly instituted on the petition of three of the creditors of Thompson in the District Court of the United States for the Western District of Pennsylvania for his adjudication as a bankrupt and that such proceedings were had that on or about September 10th, 1917, the said Thompson was duly adjudicated a bankrupt, and admits that thereafter Trustees of said Thompson's estate were duly appointed and the administration thereof proceeded. Except as aforesaid denies each and every allegation contained in the Fourth paragraph of the complaint.

V. He denies each and every allegation contained in the Fifth paragraph of the complaint, except that he admits that at the first meeting of the creditors of the Thompson estate in the proceedings in bankruptcy instituted as aforesaid Trustees were elected by the Creditors and that said Trustees appointed the defendant Weil & Thorp, together with the firm of Umbel, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway, of Fairmont, West Virginia, their attorneys, which appointment was confirmed by the Referee in said bankruptcy proceedings, and that thereafter the defendants and the attorneys associated [fol. 18] with them as attorneys for the said Trustees continued over a period of several years to render services in the administration of the said bankrupt estate.

VI. He denies each and every allegation contained in the Sixth paragraph of the complaint, but admits that for the services rendered by the defendants Weil & Thorp, as attorneys for the Trustees of the bankrupt estate, allowances

were made from time to time by the District Court of the United States for the Western District of Pennsylvania to be paid out of the estate of the bankrupt, aggregating one hundred and forty thousand dollars ($140,000) and that a part of said sum of $140,000 was paid prior to November 15th, 1920, and the larger part thereof paid on or about said day.

VII. Answering the allegations contained in the Seventh paragraph of the complaint, he denies any knowledge or information thereof sufficient to form a belief, except that he admits that subsequent to November 15th, 1920, the plaintiff's assignor demanded that the defendants pay to him fifty-six thousand dollars ($56,000), being forty per cent. (40%) of the $140,000 received by them as attorneys for the Trustees of the bankrupt estate.

VIII. Answering the allegations contained in the Eighth paragraph of the complaint, he denies each and every allegation contained in said paragraph except that he admits that the defendants refused to comply with the demands of the plaintiff's assignor that they pay over to him the said [fol. 19] sum of fifty-six thousand dollars ($56,000), and still refuse to pay the same or any part thereof.

IX. Answering the allegations contained in the Ninth paragraph of the complaint, he denies any knowledge or information thereof sufficient to form a belief.

X. And further answering this defendant alleges:

The only services which the defendants were retained by plaintiff's assignor to perform in connection with the Thompson bankrupty proceedings were to prepare and file a petition in bankruptcy and to procure an adjudication in bankruptcy. The plaintiff's assignor informed the defendants at the time of said retainer that a contract or agreement had been made for the sale of the properties and that the sale under said contract or agreement would be consummated before or at the time of the adjudication in bankruptcy and that there would be no necessity for an administration of the estate in the bankruptcy court. The contemplated sale did not take place before or at the time of the adjudication in bankruptcy and in fact never took place. After the adjudication in bankruptcy had been ob-

tained a first meeting of the creditors was held in regular course at which Trustees in bankruptcy were elected, the Trustees so elected appointed the defendants and the firm of Umbel, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway, of Fairmont, West Virginia, their attorneys. The administration of said bankrupt estate lasted [fol. 20] for several years and is not yet fully completed. Said administration involved many and very large transactions and required the performance of continued and arduous legal services, including the prosecution and defense of a great number of actions and proceedings in many different courts both in the States of Pennsylvania and West Virginia, the said Thompson estate including many hundreds of thousands of acres of coal lands in West Virginia and Pennsylvania having a value of many millions of dollars and being subject to mortgages and other liens aggregating upwards of thirty million dollars ($30,000,000). The defendants and other attorneys for the Trustees performed the aforesaid legal services and in the performance thereof acted solely as attorneys for the Trustees. The plaintiff's assignor did not participate in the performance of any of said services and was not consulted in regard thereto and was not retained or employed by the Trustees in bankruptcy in any manner whatsoever. The defendants did not act under the direction or supervision of the plaintiff's assignor nor was there any agreement or understanding between the defendants and plaintiff's assignor that plaintiff's assignor was to have any interest in the compensation received by the defendants for the services performed by them for the Trustees of the bankrupt estate. The plaintiff's assignor never suggested any such agreement to the defendants and no such agreement was ever considered or discussed by the defendants. Any such agreement, if entered into, would have been wholly contrary to public policy unprofessional, illegal and void. [fol. 21] Wherefore this defendant asks that the complaint be dismissed with costs.

Crim & Wemple, Attorneys for Defendant A. Leo Weil. Office and P. O. address: 30 Broad Street, Borough of Manhattan, New York City. Carter, Leslyard & Milburn, of Counsel. Office and P. O. address: 54 Wall Street, Borough of Manhattan, New York City.

Duly sworn to by A. Leo Weil. Jurat omitted in printing.

[fol. 22] In United States District Court

[Title omitted]

Answer of Defendant Charles M. Thorp

The defendant, Charles M. Thorp, by Crim & Wemple, his attorneys, answers the complaint herein as follows:

First. He admits the allegations contained in the first paragraph of the complaint, except that he denies that A. Leo Weil and Charles M. Thorp were co-partners subsequent to November 30, 1920, and alleges that the firm of Weil & Thorp was dissolved at the close of business on that day.

Second. He denies the allegations contained in the second paragraph of the complaint, except that he admits that Samuel Untermyer had been retained as attorney and counsel for a large number of creditors of Josiah V. Thompson, whose affairs were greatly involved. As defendant is informed and believes, said creditors were organized and were represented by and acting through a Creditors' Committee, and said Samuel Untermyer was acting for and [fol. 23] under the instructions of said Creditors' Committee.

Third. He denies the allegations of the third paragraph of the complaint, except that he admits that it was determined that bankruptcy proceedings should be instituted against said Thompson and the defendants were retained to institute such proceedings. At that time, as defendant is informed and believes, negotiations were pending looking to a sale of said Thompson's property and it was believed that said sale would be consummated in a short time and that in consequence the bankruptcy proceedings would be of short duration and the defendants were retained to prepare and file a petition in bankruptcy and to take such proceedings therein as were necessary to obtain an adjudication in bankruptcy, and it was agreed that $5,000 would be reasonable compensation for the services which would be required.

Fourth. He denies the allegations contained in the fourth paragraph of the complaint. It is true that upon the understanding set forth in the third paragraph of this answer bankruptcy proceedings were instituted on the petition of certain creditors of said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and that thereupon such proceedings were had; that on or about September 10, 1917, said Thompson was duly adjudicated a bankrupt; and it is true that thereafter trustees of his estate were duly appointed and the administration thereof proceeded. Instead of said proceedings being of short duration they lasted for over three years and have not in fact yet been completed.

[fol. 24] Fifth. He denies the allegations contained in the fifth paragraph of the complaint, except that he admits that at the first meeting of the creditors of said Thompson in the proceedings in bankruptcy trustees were elected by the creditors. Said trustees in bankruptcy appointed the defendants Weil & Thorp, together with the firm of Umber, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway of Fairmont, W. Va., their attorneys, which appointment was confirmed by the Referee in Bankruptcy, and thereafter the defendants and the attorneys associated with them as attorneys for said trustees, rendered services in the administration of said bankrupt estate, continuing to do so for a period of over three years. The services so rendered were rendered by the defendants in the due and proper administration of the bankrupt estate and by virtue of their appointment as attorneys for the trustees in bankruptcy, and the defendants were entitled to receive for their services such allowance as should eventually be made by the Court in payment for such services. It is not true that defendants at any time under any circumstances agreed with Samuel Untermyer that they were to receive for the services rendered by them only such sum as said Samuel Untermyer should consider just and equitable, and that the remainder of the amount allowed by the Court in payment for such service should be payable to him the said Samuel Untermyer. This defendant never made any such agreement with said Samuel Untermyer and never knew that Samuel Untermyer claimed that there was any

such an agreement until this suit was brought; and upon information and belief this defendant avers that the other [fol. 25] defendant, A. Leo Weil, never made any such agreement. And defendant avers that any such agreement would have been without consideration, contrary to public policy, unprofessional, illegal and void.

Sixth. He denies the allegations of the sixth paragraph of the complaint, except that he admits that for the services rendered by the defendants as attorney for the trustees of the bankrupt estate allowances were made from time to time by the District Court of the United States for the Western District of Pennsylvania of amounts to be paid out of the estate of the bankrupt aggregating $140,000. A part of said sum was paid prior to November 15, 1920, and the larger part thereof on or about that day.

Seventh. He denies the allegations of the seventh paragraph of the complaint, except that he admits that subsequent to November 15, 1920, said Samuel Untermyer demanded that the defendants pay to him $50,000 out of the amounts received by them for their services as attorneys for the trustees of the bankrupt estate.

Eighth. He denies the averments of the eighth paragraph of the complaint, except that he admits that defendants refused to comply with the demands of said Samuel Untermyer to pay him said sum of $50,000, and still refuse to comply with the same.

Ninth. The defendant has no information or knowledge with regard to the allegations of the ninth paragraph of the [fol. 26] complaint sufficient to form a belief, and therefore does not admit said allegations, but calls upon the plaintiff to prove the same.

Tenth. For further answer this defendant, upon information and belief, alleges that the only services which the defendants were originally retained by said Creditors Committee to perform in connection with the Thompson bankruptcy proceedings, were to prepare and file a petition in bankruptcy and to prosecute the same to an adjudication in bankruptcy; that at the time of said retainer said Samuel Untermyer informed the defendants that negotiations were pending for the sale of the properties of said Thomp-

son and that a sale thereunder should be consummated before or at the time of the adjudication in bankruptcy, and there would be in consequence no necessity for the administration of the estate in Bankruptcy Court; that the contemplated sale did not take place; that the bankruptcy proceedings were prosecuted to an adjudication; that after the adjudication a first meeting of the creditors was held in regular course at which trustees in bankruptcy were elected and the trustees so elected appointed the defendants and the firm of Umbel, Robinson, McKean & Williams, of Uniontown, Pa., and W. H. Conaway, of Fairmont, W. Va., their attorneys, and thereafter the defendants represented and acted solely for said trustees; that the administration of said bankrupt estate lasted for over three years and is not yet fully completed; that said administration involved many and very large transactions and required the performance of continuous and arduous legal services, includ-
[fol. 27] ing the prosecution and defense of a great number of actions and proceedings in many different courts both in the states of Pennsylvania and West Virginia, said Thompson estate including hundreds of thousands of acres of coal lands in West Virginia and Pennsylvania, having a value of many millions of dollars, and being subject to mortgages and other liens aggregating upwards of thirty million dollars; that the defendants and the other attorneys for the trustees performed said legal services and in the performance thereof acted solely as attorneys for the trustees; that said Samuel Untermyer did not participate in the performance of any of said services and was not consulted in regard thereto nor employed by the trustees in bankruptcy in any manner whatsoever; that the defendants did not act under the direction or supervision of said Samuel Untermyer; that said Samuel Untermyer was originally and continued to be counsel for said Creditors Committee, and has received or will receive ample compensation through said Committee; that there never was any agreement or understanding between the defendants and said Samuel Untermyer that the latter was to have any interest in the compensation received by the defendants for the services performed by them for the trustees of the bankrupt estate; that the said Samuel Untermyer never suggested any such agreement to the defendants and no such agreement was

ever considered or discussed by them; and that any such agreement if entered into would have been without consideration, contrary to public policy, unprofessional, illegal and void.

[fol. 28] Eleventh. And for further answer this defendant upon information and belief alleges that said Samuel Untermyer represented and acted as counsel for said Creditors' Committee, and that when a final sale and disposition of the property of the bankrupt was made it was provided in and by the contract of sale that the purchaser of the property should pay a very large sum, to wit, three hundred sixty thousand dollars, in addition to the purchase price, to cover the compensation and expenses of the Creditors' Committee and its counsel; that as defendant is informed and believes, said Creditors' Committee and its counsel were to make no claim upon the fund realized from said sale but were to look wholly to said $360,000 for their compensation; and that said Samuel Untermyer has claimed and received, or will receive, out of said sum of three hundred sixty thousand dollars a very large proportion thereof as compensation for his services to said Creditors' Committee.

Wherefore this defendant asks that the complaint be dismissed with costs.

Crim & Womple, Attorneys for Defendant Charles M. Thorp.

[fol. 29] *Duly sworn to by Charles M. Thorp. Jurat omitted in printing.*

[fol. 30] In United States District Court

[Title omitted]

Amended Complaint

The plaintiff, by Guggenheimer, Untermyer & Marshall, his attorneys, complaining of the defendants as and for an amended complaint, alleges on information and belief:

First. At all the times hereinafter mentioned the defendants, A. Leo Weil and Charles M. Thorp, were copartners,

engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp. During all of said times Samuel Untermyer, the plaintiff's assignor, was engaged in the practice of law in the City of New York.

Second. Prior to the month of August, 1917, the plaintiff's assignor had been retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pennsylvania, where he was [fol. 31] engaged in business as a banker and in the operation of coal mines, to enable them to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved and it was agreed in the interests of his creditors and especially of those represented by plaintiff's assignor, that the extensive properties of the said Thompson should be conserved so that they might be applied equitably in the payment of the claims of his creditors.

Third. The plaintiff's assignor, acting under instructions of the creditors, by whom he had been retained, and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. To that end he informed the defendants of his plans in that regard and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five Thousand Dollars ($5,000.00).

Fourth. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court of the United States for the Western [fol. 32] District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt, and trustees of his estate

were duly appointed and the administration thereof proceeded, the defendants herein acting for plaintiff's assignor and the interests represented by him.

Fifth. In the course of the administration of the estate of the said Thompson, various complications arose which prolonged the period of the administration of the estate beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings and which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the plaintiff's assignor and the firm with which he was associated should together perform such services and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of Five Thousand Dollars ($5,000.00) as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated should collaborate with the defendants under the direction of the former in the performance of such services, and that the defendants [fol. 33] were to receive for the services rendered by them out of such allowance as should eventually be made by the Court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.

Sixth. Pursuant to such arrangement the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision of plaintiff's assignor and with the active aid of the latter and of the firm with which he was associated, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919, and July 18, 1919, in the total sum of Thirty Thousand five hundred Dollars ($30,500.00), on or about June 1, 1920, in the sum of Forty-

five Thousand three hundred and sixty-six Dollars and sixty-six cents ($45,366.66), on or about October 27, 1920, in the sum of Sixty-eight Thousand and ninety-three Dollars and thirty-two cents ($68,093.32), on or about November 30, 1920, in the sum of Twenty-one thousand Dollars ($21,000.00), and on or about May 10, 1924, in the sum of Twenty-three Thousand three hundred and thirty-three Dollars and thirty-one cents ($23,333.31), amounting to the total sum of One Hundred and eighty-eight Thousand and two hundred and ninety-three Dollars and twenty-nine cents ($188,293.29), to be paid out of the estate of the bankrupt in payment for the services rendered by [fol. 34] the defendants in said proceedings, and on or about the dates hereinbefore set forth payments were received by the defendants in the amounts above set forth, together aggregating said sum of $188,293.29, were paid to the defendants by the Trustees in Bankruptcy of the said Thompson. A substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated.

Seventh. It is the intention of the defendants to make a further application for a further and additional allowance to them in payment for the services rendered by them in said proceedings to be payable out of the estate of the bankrupt when said bankruptcy proceedings are concluded, as to which if and when and to the extent allowed, plaintiff claims that the above-stated agreement will also apply.

Eighth. On being informed of such payments to the defendants, plaintiff's assignor, recognizing the aforesaid agreement and the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $188,293.29 paid to the defendants as aforesaid, and of any further sums to be allowed the defendants in said proceedings, was that the defendants should retain sixty per cent. (60%) of the said sums received by them and of any further sums allowed them in said proceedings, and that the remaining forty per cent. (40%) was to be paid to him, and informed the defendants of his determination with respect to such division.

[fol. 35] Ninth. Thereafter, the defendants, although for a long time admitting and recognizing the rights of the plaintiff's assignor in the premises and seeking to induce him to make a larger allowance to them, refused to comply with the demands of plaintiff's assignor that they pay over to him forty per cent. (40%) of the sum so received by them, and, although often requested to pay to him the said sum, have refused to pay the same or any part thereof, and remain indebted therefor with interest on $12,200 from September 3, 1918, July 2, 1919, and July 18, 1919, according to the respective amounts received by the defendants on said dates; on $18,146.66 from June 1, 1920; on $26,717.33 from October 27, 1920; on $8,400 from November 30, 1920; and on $9,333.32 from May 10, 1924.

Tenth. Prior to the commencement of this action, plaintiff's assignor duly assigned and transferred to the plaintiff all of his right, title and interest in the cause of action herein set forth and the plaintiff is now the owner thereof.

Wherefore, the plaintiff demands judgment against the defendants for the sum of $75,317.31, with interest as follows: from September 3, 1918, July 2, 1919, and July 18, 1919, on $12,200 thereof, according to the respective amounts received by the defendants on said dates; from June 1, 1920, on $18,146.66; from October 27, 1920, on $27,237.33; from November 30, 1920, on $8,400; and from May 10, 1924, on $9,333.32; and for forty per cent. (40%) of any and all further and additional allowances granted the defendants in said proceedings as and when received by the [fol. 36] defendants; together with the costs and disbursements of this action.

Guggenheimer, Untermyer & Marshall, Attorneys
Plaintiff. Office and Post Office address: 120 Broadway, Borough of Manhattan, City of New York, N. Y.

Duly sworn to by Edward M Neary. Jurat omitted in printing.

[fol. 37] In United States District Court

[Title omitted]

Answer of A. Leo Weil to Amended Complaint

The defendant A. Leo Weil, by Stien & Salant, his attorneys, answers the amended complaint herein as follows:

1. He denies the allegation contained in the subdivision of the said amended complaint marked "First," that at all the times therein mentioned the defendants were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp; and he alleges in connection therewith that the defendants were such copartners until on or about the 1st day of December, 1920, but not thereafter.

2. He admits, upon information and belief, each and every of the allegations contained in the subdivision of the said amended complaint marked "Second."

[fol. 38] 3. He admits, upon information and belief, the allegation contained in the subdivision of the said amended complaint marked "Third", that the plaintiff's alleged assignor, acting under instructions of the creditors by whom he had been retained, and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. He admits the further allegation in said subdivision contained that to that end the plaintiff's alleged assignor informed the defendants of his plans in that regard and retained the defendants. He denies each and every other allegation in said subdivision contained, and he alleges in connection therewith, that plaintiff's alleged assignor retained the defendants under the following circumstances and solely for the following limited and specific purposes and no others to wit:—Plaintiff's alleged assignor was at that time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants, that the said sale would shortly be

consummated and would meet with the approval of all the creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Plaintiff's alleged assignor accordingly retained defendants to present and file an involuntary petition in bankruptcy against the said Thompson, to procure an adjudication that the said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and [fol. 39] advisable in connection therewith for the purpose of preventing the disintegration of the said Thompson's estate until such adjudication or until the contemplated composition was effected, all of which was to be conducted under the supervision of the plaintiff's alleged assignor. He further alleges in connection therewith that plaintiff's alleged assignor so retained the defendants under an understanding and agreement whereby the defendants were to be paid and were to receive from the plaintiff's assignor in compensation for the services so to be rendered by them the sum of Five thousand ($5,000) Dollars or such other sum as plaintiff's alleged assignor might fix in the event that the services so rendered should be more extensive than were then contemplated.

4. He admits the allegation contained in the subdivision of the said amended complaint marked "Fourth", that bankruptcy proceedings were duly instituted on the petition of three of the creditors of said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and he admits the further allegation in said subdivision contained that thereupon such proceedings were had that on or about September 10, 1917 the said Thompson was duly adjudicated a bankrupt. He alleges in connection therewith that the said negotiations of plaintiff's alleged assignor for the sale of the said Thompson's entire property or the greater bulk thereof were not consummated either then or at any other time, that the contemplated composition was not effected, that it therefore became necessary to elect or appoint a trustee or trustees in bankruptcy in regular course, and that thereupon and at the request [fol. 40] of plaintiff's alleged assignor the defendants

attempted in conjunction with the plaintiff's alleged assignor to secure the election and appointment of one George R. Scrugham as sole trustee; thereupon and at a meeting of creditors duly held three trustees were elected and appointed of the said Thompson's estate in bankruptcy, the said trustees duly designated the defendants as their general counsel, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, as associate counsel, and the said designations were duly ratified and confirmed by the District Court of the United States for the Western District of Pennsylvania. He admits that up to the time of the election and appointment of the said three trustees as aforesaid the defendants acted for the plaintiff's alleged assignor and for the interests represented by him, to wit, a certain committee of the creditors of the said Thompson known as the Creditors' Committee, both in presenting and filing the petition in bankruptcy and in securing the adjudication in bankruptcy and in endeavoring to secure the election and appointment of the said sole trustee, and he further admits that in rendering the said services the defendants acted under the supervision and direction of the plaintiff's alleged assignor; but he emphatically denies that from and after the election and appointment as aforesaid of the said three trustees the defendants at any time acted for the plaintiff's alleged assignor or for the interests represented by him or under the direction or supervision of the plaintiff's alleged assignor, or under or pursuant to any agreement or understanding, express or implied, with the plaintiff's alleged assignor; and he al- [fol. 41] leges, on the contrary, that upon the election and appointment of the said three trustees as aforesaid and the designation and confirmation of the defendants as general counsel to the trustees as aforesaid, the retainer and employment of the defendants by the plaintiff's alleged assignor and the interests represented by him was fulfilled and terminated and came to and end, and that from that time forth the defendants acted in all matters connected with the said bankruptcy estate solely by virtue of and under and pursuant to their said designation and confirmation as general counsel to the trustees and as officers duly appointed of the Court, and not otherwise.

He denies each and every allegation in said subdivision contained not hereinbefore expressly admitted or denied.

5. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Fifth", except that he admits that between the presentment and filing of the petition in bankruptcy by the defendants and the appointment of the trustees, various complications arose which rendered it necessary for the defendants to perform during the said period more extensive and laborious services under the supervision of the plaintiff's alleged assignor than it was originally believed would be necessary for the defendants to perform during the said period, and except that he further admits that, recognizing that fact, plaintiff's alleged assignor and the defendants thereupon agreed that the compensation of the defendants for services in said bankruptcy proceedings up to the time of the appointment of the trustees was not to be limited to the sum of Five thousand ($5,000) Dollars. [fol. 42] And he specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants regarding the performance of services by the defendants after the appointment of the trustees in bankruptcy, or regarding the compensation of the defendants for services performed by them after the appointment of the trustees in bankruptcy, or regarding any collaboration of the defendants with the plaintiff's alleged assignor and the firm of lawyers with which he was associated in the performance of services after the appointment of the said trustees, and he further specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants whereby the defendants were to receive for the services rendered by them after the appointment of the trustees such sum as plaintiff's alleged assignor might consider just and equitable, the remainder of any amount allowed to them to be payable to plaintiff's alleged assignor. And he further alleges that the services rendered by the defendants after their designation and confirmation as general counsel to the trustees were rendered in collaboration with the associate counsel to the said trustees duly designated and confirmed, to wit, Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr.

Waitman H. Conaway of Fairmont, West Virginia, and not in collaboration with or under the direction of plaintiff's alleged assignor or the firm with which he was connected, and that any and all services rendered by plaintiff's alleged assignor and his said firm were rendered as counsel to the Creditors' Committee aforesaid and not otherwise. And he not only denies that there was ever any such agree- [fol. 43] ment or understanding contemplated, or made, or even suggested, as that claimed by plaintiff, but he alleged that any such agreement or understanding would have been unprofessional, contrary to public policy, a fraud upon the trustees and the Court appointing and confirming the defendants as general counsel to the trustees, and illegal, null and void.

6. He admits the allegation contained in the subdivision of the said amended complaint marked "Sixth", that the defendants continued to render services in the said bankruptcy proceedings, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919 and July 18, 1919, in the total sum of $30,500.00, on or about June 1, 1920 in the sum of $45,366.66, and on or about October 27, 1920 in the sum of $68,093.32, to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and on or about the said dates payments were received by the defendants in the amounts above set forth, but he denies each and every other allegation in said subdivision contained; and he alleges in connection therewith the sum of $21,000.00 allowed and paid on or about November 30, 1921 and not on or about November 30, 1920, as alleged in the said amended complaint) and the further sum of $23,333.31 allowed and paid on or about May 10, 1924, were so allowed and paid to the defendant A. Leo Weil solely for services rendered by him after the dissolution of the firm of Weil & Thorp, and that neither the said firm nor the defendant Charles M. Thorp participated in the said al- [fol. 44] allowances nor in the services for which the said allowances were made.

7. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked

"Seventh," and alleges, in connection therewith, that it is the intention of the defendant A. Leo Weil to make a further application for a further and additional allowance to him in payment for the services rendered by him in said proceedings, to be payable out of the estate of the bankrupt when said bankruptcy proceedings are concluded.

8. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Eighth," and he alleges, in connection therewith, that the plaintiff's alleged assignor in or about the year 1920 made a demand wholly without right, basis or justification, that the defendants pay to him forty (40%) per cent of all sums theretofore allowed to and received by them from the said bankruptcy estate.

9. He admits the allegation contained in the subdivision of the said amended complaint marked "Ninth," that the defendants refused to comply with the demands of plaintiff's assignor that they pay over to him forty (40%) per cent of the sums received by them, and he admits the further allegation in said subdivision contained that the defendants refused, after request, to pay the same, but he denies each and every other allegation in said subdivision contained.

10. He denies that he has any knowledge or information thereof sufficient to form a belief as to each and every of [fol. 45] the allegations contained in the subdivision of the said amended complaint marked "Tenth."

Further answering the said amended complaint, and for a separate and distinct defense thereto, the defendant A. Leo Weil alleges as follows:

11. In or about the month of August, 1917, plaintiff's alleged assignor retained and employed defendants to present and file an involuntary petition in bankruptcy against Josiah W. Thompson, to procure an adjudication that the said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and advisable in connection therewith for the purpose of preventing the disintegration of the estate of the said Thompson until such adjudication or until a contemplated composition was effected. Plaintiff's alleged as-

signor was at said time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants that the said sale would shortly be consummated and would meet with the approval of all the creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Defendants accepted the said retainer and employment for the limited and specific purposes above stated under and pursuant to an agreement between plaintiff's alleged assignor and defendants, whereby defendants were to perform the said services under the supervision and direction [fol. 46] of plaintiff's alleged assignor, and were to be paid in compensation therefor by plaintiff's alleged assignor, the sum of Five thousand ($5,000) Dollars, or such other sum as plaintiff's alleged assignor might fix in the event that the services rendered should be more extensive than were then contemplated.

12. Thereupon and pursuant to the said retainer and employment defendants, acting under the supervision and direction of plaintiff's alleged assignor did duly present and file an involuntary petition in bankruptcy against the said Thompson in the District Court of the United States for the Western District of Pennsylvania, did duly procure on or about the 10th day of September, 1917, an adjudication that the said Thompson was a bankrupt, and did duly perform extensive and laborious services in various proceedings to prevent the disintegration of the estate of the said Thompson. The said sale of the entire property or the greater bulk thereof of the said Thompson failed of consummation and it became necessary to elect and appoint a trustee or trustees of the said Thompson's estate in bankruptcy in regular course. Thereupon and at the request of plaintiff's alleged assignor defendants performed further services for plaintiff's alleged assignor in endeavoring to procure the election and appointment of one George R. Scrugham as sole trustee. At a meeting duly held of the creditors of the said Thompson three trustees were duly elected and appointed on or about the 17th day of October, 1917. Thereupon and pursuant to the retainer and employ-

ment aforesaid, the said retainer and employment was fulfilled and the same terminated and came to an end.
[fol. 47] The services so rendered as aforesaid by defendants under the said retainer and employment and at the request of plaintiff's alleged assignor were more extensive and laborious than had been contemplated by plaintiff's alleged assignor and defendants at the time of the said retainer and employment, and it was thereupon agreed that defendants should not be limited in their compensation for the said services to the sum of Five thousand ($5,000) Dollars.

13. Upon the election and appointment of the trustees in bankruptcy as aforesaid, the said trustee in bankruptcy duly designated, and the said District Court duly ratified and confirmed the designation of, the defendants as general counsel for the said trustees in bankruptcy, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, as associate counsel for the said trustee. Thereupon and pursuant to their said designation as general counsel to the trustees, the defendants proceeded to render and did continue to render services as such general counsel to the trustees in connection with the said bankruptcy estate until on or about the 1st day of December, 1920, when the co-partnership of the defendants was terminated, and from and after said latter date the defendant A. Leo Weil has continued to render and is now rendering services as general counsel to the said trustees in connection with the said estate.

From and after the designation as aforesaid of the defendants as general counsel for the said trustees, all of the [fol. 48] services rendered by the defendants up to on or about the 1st day of December, 1920, and thereafter all the services rendered by the defendant A. Leo Weil in connection with the said estate, have been rendered pursuant to the said designation and as officers of the Court, and the same have not been rendered under or pursuant to any agreement or understanding of any kind or nature whatsoever, express or implied, with the plaintiff's alleged assignor, or with any other person or persons whatsoever.

14. Immediately after the election and appointment of the said trustees in bankruptcy and the designation by them and the approval by the said District Court of their said counsel, the said trustees and their said counsel proceeded to conclude the sale of that portion of the bankrupt's estate involved in what is known as the Frick sale. Most of the substantial terms of the said Frick sale had, however, been negotiated prior to the appointment of the said trustees by the said Creditors' Committee and by plaintiff's alleged assignor as its counsel.

Upon the consummation of the said Frick sale it was determined to make an application for counsel fees out of the proceeds of the said sale for services rendered in connection therewith. Thereupon, and having in mind that most of the substantial terms of the said sale had been actually negotiated as aforesaid by the said Creditors' Committee and the plaintiff's alleged assignor as its counsel, and having further in mind that the plaintiff's alleged assignor had as yet received no compensation for the services rendered by him in connection with the estate of the said Thompson, the said general and associate counsel to the [fol. 49] trustees and the firm with which plaintiff's alleged assignor was associated, pursuant to agreement among all of them, presented a joint petition and application for counsel fees to be paid to them jointly out of the proceeds of the said Frick sale for services rendered in connection therewith. The said petition and application was duly granted and an allowance was duly made out of the proceeds of the said Frick sale for counsel fees to the said petitioners and applicants jointly for services rendered in connection with the said sale. After a division of the counsel fees so allowed between defendants, on the one hand, and the associate counsel to the trustee, on the other hand, the defendants offered to plaintiff's alleged assignor to pay to him for the firm with which he was associated, to wit, Guggenheimer, Untermeyer & Marshall, whatever proportion he desired out of the balance left to be divided between the defendants and the said firm, and the defendants repeatedly requested plaintiff's alleged assignor to fix and name the proportion that he desired, but the plaintiff's alleged assignor did not do so at any time prior to the commencement of this action and has not done so even up to the present time.

15. At or about the time of the petition and application for the said fees from the said Frick sale, and in or about the month of May, 1918, a serious and personal disagreement, arising out of a matter not connected with the said Thompson estate, occurred between the plaintiff's alleged assignor and the defendant A. Leo Weil, of such a nature as to make further personal relations between them impossible, and it was thereupon agreed between the plaintiff's [fol. 50] alleged assignor and the defendant A. Leo Weil that they and their respective firms should have no further professional relationship of any kind with each other.

16. The administration in bankruptcy of the said Thompson estate by the trustees and by their counsel continued, further sales of small portions of the estate were negotiated and made by the trustees and their said counsel, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was negotiated and made by the trustees and their counsel to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' Committee and by the plaintiff's alleged assignor as its counsel, wherein and whereby it was provided that the purchaser, in addition to paying to the trustees in bankruptcy the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and its counsel, i. e., plaintiff's alleged assignor, prior to the bankruptcy and for such assistance as the said Creditors' Committee and its said counsel may have rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000.00. The said contract of purchase and sale was duly ratified and approved by the said District Court, and the purchaser did thereupon pay to the said Creditors' Committee, pursuant thereto, the sum of $360,000.00 or the greater part of the said sum, and the plaintiff's assignor has received and will receive from the said sum a large amount of money in full for any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thompson, both before the adjudication in bankruptcy and subsequent thereto.

[fol. 51] Plaintiff's alleged assignor and the firm with which he was connected did not then or thereafter prior

to the commencement of this action make any claim, nor has plaintiff in this action made any claim, upon defendants for any part of the fees received as aforesaid by defendants in connection with and out of the Frick sale, and defendants did not therefore demand from plaintiff's alleged assignor prior to the commencement of this action, and have not demanded in this action, compensation for the services rendered by them as aforesaid prior to the election and appointment of the trustees in bankruptcy.

17. Any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thompson were so rendered, both before the adjudication in bankruptcy and after the said adjudication, as counsel to the said Creditors' Committee and not otherwise.

On the other hand, from and after the designation of the defendants as general counsel to the said trustees, any and all services rendered by the defendants as a partnership and thereafter by the defendant A. Leo Weil solely in connection with the estate of the said Thompson were so rendered as such general counsel to the trustees and not otherwise, and any and all fees and allowances paid out of the bankrupt estate to the defendants as a partnership and to the defendant A. Leo Weil, and to Messrs. Umbel, Robinson, McKean & Williams and to Mr. Waitman H. Conaway, were, except as to the said Frick fees, allowed and paid for services rendered by them solely as general and associate counsel to the trustees, and were not allowed or paid for any services rendered in whole or in part by plaintiff's alleged assignor or by the firm with which he was connected, and the said [fol. 52] fees were allowed and paid, as plaintiff's assignor and his representatives should have known and did well know, only after sworn proof had been submitted to the Court that the services for which the same were allowed and paid had been rendered by the said general and associate counsel to the trustees and not by any other person or persons whatsoever.

In performing the said services, the defendants as a partnership and thereafter the defendant A. Leo Weil acted solely for the said trustees, and did not act for the plaintiff's alleged assignor, nor for the interests represented by him, nor did they act under the supervision or direction of or in collaboration with the plaintiff's alleged assignor,

nor was there any agreement or understanding, expess or implied, that defendants as a partnership or defendant A. Leo Weil as general counsel to the trustees would act for plaintiff's alleged assignor or for the interests represented by him, nor was the plaintiff's alleged assignor or the firm with which he was connected associated with defendants or either of them in the rendition of services to the trustees, nor was there any agreement or understanding, express or implied, between the plaintiff's alleged assignor and the defendants or either of them regarding any allowances or fees to be received by the defendants as a partnership or by defendant A. Leo Weil as general counsel to the trustees, saving and excepting as hereinbefore alleged with regard to the fees paid out of the proceeds of the Frick sale for the services rendered in connection with the said sale.

18. And the defendant further avers that the alleged agreement set forth in the amended complaint herein where- [fol. 53] by the defendants are purported to have agreed that, while holding the office of general counsel to the trustees, they would collaborate with and act under the direction of the plaintiff's alleged assignor in the performance of services as general counsel to the trustees, and would act for the plaintiff's alleged assignor and the interests represented by him, and would receive out of the allowances to be made to them as general counsel to the trustees, such sum as plaintiff's alleged assignor considered just and equitable, the remainder of the amount of such allowances to be payable to plaintiff's alleged assignor, would have been, if any such agreement had been made, unprofessional, against public policy, a fraud upon the trustees and the Court designating and confirming the defendants as general counsel, and illegal, null and void.

And the defendant further alleges in this connection that in the course of the administration of the bankruptcy estate of the said Thompson, the interest of the said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were at times inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and by the defendants as their counsel, and that the allowances awarded and paid to the defendants, of which the plaintiff now seeks to recover a part, were so awarded

and paid for services rendered by the defendants to the trustees partly in connection with matters where the interests of the said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were, as aforesaid, inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and their counsel.

[fols. 54 & 55] Wherefore this defendant demands judgment dismissing the amended complaint herein, with costs.

Stein & Salant, Attorneys for Defendant A. Leo Weil. Office & P. O. address: 1328 Broadway, Borough of Manhattan, New York City. Carter, Ledyard & Milburn, of Counsel. Office & P. O. address: 54 Wall Street, Borough of Manhattan, New York City.

Duly sworn to by A. Leo Weil. Jurat omitted in printing.

[fol. 56] In United States District Court

[Title omitted]

Answer of Charles M. Thorp to Amended Complaint

The defendant Charles M. Thorp, by Stein & Salant, his attorneys, answers the amended complaint herein as follows:

1. He denies the allegation contained in the subdivision of the said amended complaint marked "First," that at all the times therein mentioned the defendants were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp; and he alleges in connection therewith that the defendants were such copartners until on or about the 1st day of December, 1920, but not thereafter.

2. He admits, upon information and belief, each and every of the allegations contained in the subdivision of the said amended complaint marked "Second."

[fol. 57] 3. He admits, upon information and belief, the allegation contained in the subdivision of the said amended complaint marked "Third," that the plaintiff's alleged as-

signor, acting under instructions of the creditors by whom he had been retained, and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. He admits the further allegation in said subdivision contained that to that end the plaintiff's alleged assignor informed the defendants of his plans in that regard and retained the defendants. He denies each and every other allegation in said subdivision contained, and he alleges in connection therewith, that plaintiff's alleged assignor retained the defendants under the following circumstances and solely for the following limited and specific purposes and no others, to wit:—Plaintiff's alleged assignor was at that time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants, that the said sale would shortly be consummated and would meet with the approval of all the creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Plaintiff's alleged assignor accordingly retained defendants to present and file an involuntary petition in bankruptcy against the said Thompson, to procure an adjudication that the said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and advisable in connec- [fol. 58] tion therewith for the purpose of preventing the disintegration of the said Thompson's estate until such adjudication or until the contemplated composition was effected, all of which was to be conducted under the supervision of the plaintiff's alleged assignor. He further alleges in connection therewith that plaintiff's alleged assignor so retained the defendants under an understanding and agreement whereby the defendants were to be paid and were to receive from the plaintiff's assignor in compensation for the services so to be rendered by them the sum of Five thousand ($5,000) Dollars or such other sum as plaintiff's alleged assignor might fix in the event that the services so rendered should be more extensive than were then contemplated.

4. He admits the allegation contained in the subdivision of the said amended complaint marked "Fourth," that bankruptcy proceedings were duly instituted on the petition of three of the creditors of said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and he admits the further allegation in said subdivision contained that thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt. He alleges in connection therewith that the said negotiations of plaintiff's alleged assignor for the sale of the said Thompson's entire property or the greater bulk thereof were not consummated either then or at any other time, that the contemplated composition was not effected, that it therefore became necessary to elect and appoint a trustee or trustees in bankruptcy in regular course, and that thereupon and at the request of plaintiff's [fol. 59] alleged assignor the defendants attempted in conjunction with the plaintiff's alleged assignor to secure the election and appointment of one George R. Scrugham as sole trustee; thereupon and at a meeting of creditors duly held three trustees were elected and appointed of the said Thompson's estate in bankruptcy, the said trustees duly designated the defendants as their general counsel, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway, of Fairmont, West Virginia, as associate counsel, and the said designations were duly ratified and confirmed by the District Court of the United States for the Western District of Pennsylvania. He admits that up to the time of the election and appointment of the said three trustees as aforesaid the defendants acted for the plaintiff's alleged assignor and for the interests represented by him, to wit, a certain committee of the creditors of the said Thompson known as the Creditors' Committee, both in presenting and filing the petition in bankruptcy and in securing the adjudication in bankruptcy and in endeavoring to secure the election and appointment of the said sole trustee, and he further admits that in rendering the said services the defendants acted under the supervision and direction of the plaintiff's alleged assignor; but he emphatically denies that from and after the election and appointment as aforesaid of the said three trustees the defendants at any time acted for the

plaintiff's alleged assignor or for the interests represented by him or under the direction or supervision of the plaintiff's alleged assignor, or under or pursuant to any agreement or understanding, express or implied, with the plain-
[fol. 60] tiff's alleged assignor; and he alleges, on the contrary, that upon the election and appointment of the said three trustees as aforesaid and the designation and confirmation of the defendants as general counsel to the trustees as aforesaid, the retainer and employment of the defendants by the plaintiff's alleged assignor and the interests represented by him was fulfilled and terminated and came to an end, and that from that time forth the defendants acted in all matters connected with the said bankruptcy estate solely by virtue of and under and pursuant to their said designation and confirmation as general counsel to the trustees and as officers duly appointed of the Court, and not otherwise.

He denies each and every allegation in said subdivision contained not hereinbefore expressly admitted or denied.

5. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Fifth," except that he admits that between the presentment and filing of the petition in bankruptcy by the defendants and the appointment of the trustees, various complications arose which rendered it necessary for the defendants to perform during the said period more extensive and laborious services under the supervision of the plaintiff's alleged assignor than it was originally believed would be necessary for the defendants to perform during the said period, and except that he further admits that, recognizing that fact, plaintiff's alleged assignor and the defendants thereupon agreed that the compensation of the defendants for services in said bankruptcy proceedings up to the time of the appointment of the trustees was not to be limited to
[fol. 61] the sum of Five thousand ($5,000) Dollars. And he specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants regarding the performance of services by the defendants after the appointment of the trustees in bankruptcy, or regarding the compensation of the defendants for services performed by them after the appointment of the trustees in bankruptcy or regarding any collabora-

tion of the defendants with the plaintiff's alleged assignor and the firm of lawyers with which he was associated in the performance of services after the appointment of the said trustees, and he further specifically denies that there was any agreement, express or implied, between the plaintiff's alleged assignor and the defendants whereby the defendants were to receive for the services rendered by them after the appointment of the trustees such sum as plaintiff's alleged assignor might consider just and equitable, the remainder of any amount allowed to them to be payable to plaintiff's alleged assignor. And he further alleges that the services rendered by the defendants after their designation and confirmation as general counsel to the trustees were rendered in collaboration with the associate counsel to the said trustees duly designated and confirmed, to wit, Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, and not in collaboration with or under the direction of plaintiff's alleged assignor or the firm with which he was connected, and that any and all services rendered by plaintiff's alleged assignor and his said firm were rendered as counsel to the Creditors' Committee aforesaid and not otherwise. And he not only denies [fol. 62] that there was ever any such agreement or understanding contemplated, or made, or even suggested, as that claimed by plaintiff, but he alleges that any such agreement or understanding would have been unprofessional, contrary to public policy, a fraud upon the trustees and the Court appointing and confirming the defendants as general counsel to the trustees, and illegal, null and void.

6. He admits the allegation contained in the subdivision of the said amended complaint marked "Sixth," that the defendants continued to render services in the said bankruptcy proceedings, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919 and July 18, 1919, in the total sum of $30,500.00, on or about June 1, 1920, in the sum of $45,366.66, and on or about October 27, 1920 in the sum of $68,093.32, to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and

on or about the said dates payments were received by the defendants in the amounts above set forth, but he denies each and every other allegation in said subdivision contained, and alleges in connection therewith that the defendants rendered no services in said proceedings after December 1, 1920, and received no payments for services in said proceedings after October, 1920.

7. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Seventh."

[fol. 63] 8. He denies each and every of the allegations contained in the subdivision of the said amended complaint marked "Eighth," and he alleges, in connection therewith, that the plaintiff's alleged assignor in or about the year 1920 made a demand wholly without right, basis or justification, that the defendants pay to him forty (40%) per cent of all sums theretofore allowed to and received by them from the said bankruptcy estate.

9. He admits the allegation contained in the subdivision of the said amended complaint marked "Ninth," that the defendants refused to comply with the demands of plaintiff's assignor that they pay over to him forty (40%) per cent of the sums received by them, and he admits the further allegation in said subdivision contained that the defendants refused, after request, to pay the same, but he denies each and every other allegation in said subdivision contained.

10. He denies that he has any knowledge or information thereof sufficient to form a belief as to each and every of the allegations contained in the subdivision of the said amended complaint marked "Tenth."

Further answering the said amended complaint, and for a separate and distinct defense thereto, the defendant Charles M. Thorp alleges as follows:

11. In or about the month of August, 1917, plaintiff's alleged assignor retained and employed defendants to present and file an involuntary petition in bankruptcy against Josiah V. Thompson, to procure an adjudication that the [fol. 64] said Thompson was a bankrupt, and to conduct the said bankruptcy proceedings and all proceedings that might be necessary and advisable in connection therewith

for the purpose of preventing the disintegration of the estate of the said Thompson until such adjudication or until a contemplated composition was effected, plaintiff's alleged assignor was at said time negotiating a sale of said Thompson's entire property or the greater bulk thereof, and plaintiff's alleged assignor was of the opinion and so stated to defendants that the said sale would shortly be consummated and would meet with the approval of all creditors of the said Thompson and that the bankruptcy proceedings would therefore be of short duration and would not go beyond an adjudication in bankruptcy or a composition in bankruptcy. Defendants accepted the said retainer and employment for the limited and specific purposes above stated under and pursuant to an agreement between plaintiff's alleged assignor and defendants, whereby defendants were to perform the said services under the supervision and direction of plaintiff's alleged assignor, and were to be paid in compensation therefor by plaintiff's alleged assignor, the sum of Five thousand ($5,000) Dollars, or such other sum as plaintiff's alleged assignor might fix in the event that the services rendered should be more extensive than were then contemplated.

12. Thereupon and pursuant to the said retainer and employment defendants, acting under the supervision and direction of plaintiff's alleged assignor, did duly present and file an involuntary petition in bankruptcy against the said Thompson in the District Court of the United States for [fol. 65] the Western District of Pennsylvania, did duly procure on or about the 10th day of September, 1917, an adjudication that the said Thompson was a bankrupt, and did duly perform extensive and laborious services in various proceedings to prevent the disintegration of the estate of the said Thompson. The said sale of the entire property or the greater bulk thereof of the said Thompson failed of consummation and it became necessary to elect and appoint a trustee or trustees of the said Thompson's estate in bankruptcy in regular course. Thereupon and at the request of plaintiff's alleged assignor defendants performed further services for plaintiff's alleged assignor in endeavoring to procure the election and appointment of one George R. Scrugham as sole trustee. At a meeting duly held of the creditors of the said Thompson three trustees were duly elected and appointed on or about the 17th day of October,

1917. Thereupon and pursuant to the retainer and employment aforesaid, the said retainer and employment was fulfilled and the same terminated and came to an end.

The services so rendered as aforesaid by defendants under the said retainer and employment and at the request of plaintiff's alleged assignor were more extensive and laborious than had been contemplated by plaintiff's alleged assignor and defendants at the time of the said retainer and employment, and it was thereupon agreed that defendants should not be limited in their compensation for the said services to the sum of Five thousand ($5,000) Dollars.

13. Upon the election and appointment of the trustees in bankruptcy as aforesaid, the said trustees in bankruptcy duly designated, and the said District Court duly ratified [fol. 66] and confirmed the designation of, the defendants as general counsel for the said trustees in bankruptcy, and Messrs. Umbel, Robinson, McKean & Williams of Uniontown, Pennsylvania, and Mr. Waitman H. Conaway of Fairmont, West Virginia, as associate counsel for the said trustees. Thereupon and pursuant to their said designation as general counsel to the trustees, the defendants proceeded to render and did continue to render services as such general counsel to the trustees in connection with the said bankruptcy estate until on or about the 1st day of December, 1920, when the copartnership of the defendants was terminated. Upon information and belief, from and after said latter date the defendant A. Leo Weil has continued to render and is now rendering services as general counsel to the said trustee in connection with the said estate.

From and after the designation as aforesaid of the defendants as general counsel for the said trustees, all of the service rendered by the defendants up to on or about the 1st day of December, 1920, in connection with the said estate, have been rendered pursuant to the said designation and as officers of the Court, and the same have not been rendered under or pursuant to any agreement or understanding of any kind or nature whatsoever, express or implied, with the plaintiff's alleged assignor, or with any other person or persons whatsoever.

14. Immediately after the election and appointment of the said trustees in bankruptcy and the designation by them and the approval by the said District Court of their said counsel, the said trustees and their said counsel proceeded

[fol. 67] to conclude the sale of that portion of the bankrupt's estate involved in what is known as the Frick sale. Most of the substantial terms of the said Frick sale had, however, been negotiated prior to the appointment of the said trustees by the said Creditors' Committee and by plaintiff's alleged assignor as its counsel.

Upon the consummation of the said Frick sale it was determined to make an application for counsel fees out of the proceeds of the said sale for services rendered in connection therewith. Thereupon, and having in mind that most of the substantial terms of the said sale had been actually negotiated as aforesaid by the said Creditors' Committee and the plaintiff's alleged assignor as its counsel, and having further in mind that the plaintiff's alleged assignor had as yet received no compensation for the services rendered by him in connection with the estate of the said Thompson, the said general and associate counsel to the trustees and the firm with which plaintiff's alleged assignor was associated, pursuant to agreement among all of them, presented a joint petition and application for counsel fees to be paid to them jointly out of the proceeds of the said Frick sale for services rendered in connection therewith. The said petition and application was duly granted and an allowance was duly made out of the proceeds of the said Frick sale for counsel fees to the said petitioners and applicants jointly for services rendered in connection with the said sale. After a division of the counsel fees so allotted between defendants, on the one hand, and the associate counsel to the trustees, on the other hand, the defendants offered to plaintiff's alleged assignor to pay to him for the firm with which he was associated, to wit, Guggenheimer, Untermyer & Marshall, whatever proportion he desired out of the [fol. 68] balance left to be divided between the defendants and the said firm, and the defendants repeatedly requested plaintiff's alleged assignor to fix and name the proportion that he desired, but the plaintiff's alleged assignor did not do so at any time prior to the commencement of this action and has not done so even up to the present time.

15. At or about the time of the petition and application for the said fees from the said Frick sale, and in or about the month of May, 1918, a serious and personal disagreement, arising out of a matter not connected with the Thompson estate, occurred between the plaintiff's alleged assignor

and the defendant A. Leo Weil, of such a nature as to make further personal relations between them impossible, and it was thereupon agreed between the plaintiff's alleged assignor and the defendant A. Leo Weil that they and their respective firms should have no further professional relationship of any kind with each other.

16. The administration in bankruptcy of the said Thompson estate by the trustees and by their counsel continued, further sales of small portions of the estate were negotiated and made by the trustees and their said counsel, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was negotiated and made by the trustees and their counsel to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' Committee and by the plaintiff's alleged assignor as its counsel, wherein and whereby it was provided that the purchaser, in addition to [fol. 69] paying to the trustees in bankruptcy the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and its counsel, i. e., plaintiff's alleged assignor, prior to the bankruptcy and for such assistance as the said Creditors' Committee and its said counsel may have rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000.00. The said contract of purchase and sale was duly ratified and approved by the said District Court, and the purchaser did thereupon pay to the said Creditors' Committee, pursuant thereto, the sum of $360,000.00 or the greater part of the said sum, and the plaintiff's assignor has received and will receive from the said sum a large amount of money in full for any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thompson, both before the adjudication in bankruptcy and subsequent thereto.

Plaintiff's alleged assignor and the firm with which he was connected did not then or thereafter prior to the commencement of this action make any claim, nor has plaintiff in this action made any claim, upon defendants for any part of the fees received as aforesaid by defendants in connection with and out of the Frick sale, and defendants did not therefore demand from plaintiff's alleged assignor prior to the commencement of this action, and have not demanded

in this action, compensation for the services rendered by them as aforesaid prior to the election and appointment of the trustees in bankruptcy.

17 Any and all services rendered by plaintiff's alleged assignor in connection with the estate of the said Thomp- [fol. 70] son were so rendered, both before the adjudication in bankruptcy and after the said adjudication, as counsel to the said Creditors' Committee and not otherwise.

On the other hand, from and after the designation of the defendants as general counsel to the said trustees, any and all services rendered by the defendants in connection with the estate of the said Thompson were so rendered as such general counsel to the trustees and not otherwise, and any and all fees and allowances paid out of the bankrupt estate to the defendants and to Messrs. Umbel, Robinson, McKean & Williams and to Mr. Waitman H. Conaway, were, except as to the said Frick fees, allowed and paid for services rendered by them solely as general and associate counsel to the trustees, and were not allowed or paid for any services rendered in whole or in part by plaintiff's alleged assignor or by the firm with which he was connected, and the said fees were allowed and paid, as plaintiff's assignor and his representatives should have known and did well know, only after sworn proof had been submitted to the Court that the services for which the same were allowed and paid had been rendered by the said general and associate counsel to the trustees and not by any other person or persons whatsoever.

In performing the said services, the defendants acted solely for the said trustees, and did not act for the plaintiff's alleged assignor, nor was there any agreement or understanding, express or implied, that defendants as gen- [fol. 71] eral counsel to the trustees would act for plaintiff's alleged assignor or for the interests represented by him, nor was the plaintiff's alleged assignor or the firm with which he was connected associated with defendants in the rendition of services to the trustees, nor was there any agreement or understanding, express or implied, between the plaintiff's alleged assignor and the defendants regarding any allowances or fees to be received by the defendants as general counsel to the trustees, saying and excepting as hereinbefore alleged with regard to the fees paid out of the

proceeds of the Frick sale for the services rendered in connection with the said sale.

18. And the defendant further avers that the alleged agreement set forth in the amended complaint herein whereby the defendants are purported to have agreed that, while holding the office of general counsel to the trustees, they would collaborate with and act under the direction of the plaintiff's alleged assignor in the performance of services as general counsel to the trustee, and would act for the plaintiff's alleged assignor and the interests represented by him, and would receive out of the allowances to be made to them as general counsel to the trustees, such sum as plaintiff's alleged assignor considered just and equitable, the remainder of the amount of such allowances to be payable to plaintiff's alleged assignor, would have been, if any such agreement had been made, unprofessional, against public policy, a fraud upon the trustees and the Court designating and confirming the defendants as general counsel, and illegal, null and void.

And the defendant further alleges in this connection that in the course of the administration of the bankruptcy estate [fol. 72] of the said Thompson, the interests of the said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were at times inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and by the defendants as their counsel, and that the allowances awarded and paid to the defendants, of which the plaintiff now seeks to recover a part, were so awarded and paid for services rendered by the defendants to the trustees partly in connection with matters where the interests of said Creditors' Committee represented by the plaintiff's alleged assignor as its counsel were, as aforesaid, inconsistent with and opposed to the interests of the bankrupt estate represented by the trustees and their counsel.

Wherefore this defendant demands judgment dismissing the amended complaint herein, with costs.

Stein & Salant, Attorneys for Defendant Charles M. Thorp. Office & P. O. address: 1328 Broadway, Borough of Manhattan, New York City. Carter, Ledyard & Milburn, of Counsel. Office & P. O. address: 54 Wall Street, Borough of Manhattan, New York City.

[fols. 73 & 74] *Duly sworn to by Charles M. Thorp. Jurat omitted in printing.*

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING ATTORNEYS FOR DEFENDANTS—Jan. 5, 1922

Upon the annexed consent, it is hereby

Ordered, that Messrs. Stein & Salant be, and they hereby are substituted as attorneys for the defendants in the above entitled action in place and stead of Messrs. Crim & Wemple.

Alex Gilchrist, Jr., Clerk.

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONSENT TO SUBSTITUTION

We hereby consent that Stein & Salant, Esqs. be substituted as attorneys for the defendants, A. Leo Weil and Charles M. Thorp, in the above entitled suit in place of Crim & Wemple, and that an order to this effect may be entered without notice.

Dated December —, 1921.

Crim & Wemple, Attorneys for Defendants A. Leo Weil, Charles M. Thorp.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

On this 24th day of December, 1921, before me personally came A. Leo Weil to me known and known to me to be the person who executed the foregoing instrument, and he acknowledged to me that he executed the same for the uses and purposes therein set forth.

L. A. Wirth, Notary Public. My commission expires January 4th, 1925.

[fol. 77] In United States District Court

[Title omitted]

Order of Reference—Dec. 10, 1923

Upon reading and filing the annexed stipulation and on motion of Guggenheimer, Untermeyer & Marshall, attorneys for the plaintiff, it is ordered that the trial of the above entitled action be and the same hereby is referred to Allan Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon the said trial possessed by the Court, and it is

Further ordered, that the fees of the said Referee and of the stenographer herein, shall be included and taxed in the said action.

John C. Knox, J. D. C.

[fol. 78] In United States District Court

[Title omitted]

Stipulation That Cause be Tried Before Referee

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the trial of this case be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court, and it is

Further stipulated and agreed that the fees of the said Referee and of the stenographer herein, shall be included and taxed in the said action, and it is

Further stipulated and agreed that an order may be entered herein by either party without further notice.

Dated New York, December 4th, 1923.

Guggenheimer, Untermyer & Marshall, Attorney- for Plaintiff. Stein & Salant, Attorneys for Defendants.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

Hearing Before Allen Wardwell, Referee

OPINION OF REFEREE

This action is brought by the plaintiff, as assignee of Samuel Untermyer, a lawyer practising in the City of New York, against the defendants, who until December 1, 1920 were a law partnership practising in Pittsburgh, Pa. On December 1, 1920, the defendant Thorp severed his connection with the defendant Weil. For the sake of brevity, unless otherwise specified, the word "plaintiff" will be used to designate Mr. Untermyer. At the close of the case, the plaintiff moved to amend the pleadings to conform to the proof. This motion was granted and an amended complaint was served. The amended complaint set up that, prior to August, 1917, plaintiff's assignor had been retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pennsylvania, where he had been engaged in the business of banker and in the operation of coal mines. That Thomp-
[fol. 80] son's affairs were greatly involved and it was agreed that the extensive properties of Thompson should be conserved so that they might be applied equitably to the payment of creditors claims; the plaintiff determined, in order to protect the estate, it was necessary to institute bankruptcy proceedings. He informed defendants of his plans and retained them under his supervision to conduct such bankruptcy proceedings and to accept in full payment the sum of $5,000. Bankruptcy proceedings were begun, and on September 10, 1917 Thompson was adjudicated a bankrupt and trustees were appointed. That the administration of the estate proceeded, the defendants acting for the plaintiff's assignor and the interests represented by him. The administration of the estate became very complicated, "which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the adminis-

tration of the said estate in bankruptcy. Recognizing that fact plaintiff's assignor and the defendants thereupon agreed that the plaintiffs' assignor and the firm with which he was associated should together perform such services and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of Five thousand Dollars ($5,000.00) as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated should collaborate with the defendants under the direction of the former in the performance of such services and that the defendants [fol. 81] were to receive for the services rendered by them out of such allowance as should eventually be made by the Court in payment of such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him." The plaintiff then sets up that, pursuant to said arrangement, the defendants continued to render services in the bankruptcy proceedings under the general supervision of plaintiff's assignor and "with the active aid of the latter and of the firm with which he was associated", for which services allowances aggregating $188,293.29 were paid to the defendants by the Trustees in bankruptcy. That "a substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated". That the plaintiff's assignor determined that a fair division of the said allowances was 60% to the defendants and 40% to the plaintiff, and informed the defendants of his determination in this regard. Plaintiff thereupon demands judgment for $75,317.31, with interest from various dates.

The defendants' answers to this amended complaint admit that they were retained to institute the bankruptcy proceeding and allege that the defendants were retained to procure an adjudication for Thompson as bankrupt, to conduct the bankruptcy proceedings and all proceedings that might be necessary or advisable for the purpose of preventing the disintegration of the Thompson estate until the adjudication or until a contemplated composition of

creditors was effected, all of which were to be conducted under the supervision of the plaintiff's assignor. The understanding and agreement as to payment was that de- [fol. 82] fendants were to receive $5,000, or such other sum as the plaintiff's assignor might fix in the event the services so rendered should be more extensve than it was contemplated. They allege that the negotiations for the sale of Thompson's property were not consummated and the contemplated composition was not effected. It therefore became necessary to elect Trustees in Bankruptcy. Such Trustees were elected and designated defendants their general counsel with others as associates. They admit that up to the time of the election and appointment of the three Trustees defendants acted for the plaintiff's assignor and the interests represented by him, that is, a certain committee of the creditors of Thompson known as the Creditors Committee, in securing the adjudication in bankruptcy and up to the time of the appointment of the said Trustees. They deny that after the appointment of the said three Trustees they acted at any time for the plaintiff's assignor under any agreement, express or implied, and allege that their retainer and employment by the plaintiff's assignor terminated upon the appointment of the three Trustees, and generally deny that after the appointment of the said Trustees the defendants in any way acted as counsel for the plaintiff or the interests which he represented, or rendered any services in collaboration with them, and that all services rendered since that date were rendered for the Trustees and as general counsel for them. The defendant Weil admits the amount of the allowances paid, except that he states that certain allowances were made and paid after the dissolution of his firm and were allowed solely for the services of the defendant Weil.

[fol. 83] The defendants set up by way of separate defense the allegations contained in their denials and certain other matters which will be dealt with more in detail in the discussion of the testimony. The substance of defendants' position appears to be:

1. That they were retained by the Creditors Committee, which was represented by Mr. Untermyer, to obtain an adjudication in bankruptcy and to endeavor to keep the estate intact until a composition could be arrived at, in view of a

certain proposed sale of all of the property which had been under negotiation prior to the commencement of the bankruptcy proceeding; that this sale having failed, Trustees of the estate were appointed and that the defendants were appointed counsel to the Trustees and from that moment their relation with the plaintiff ceased.

2. That after the month of May 1918 a serious personal disagreement, arising out of matters not connected with the Thompson estate, occurred between the defendant Weil and the plaintiff, and it was then agreed that there should be no further professional relations between the plaintiff and the defendants and the firms with which they were connected.

3. That in June 1919 the entire remainder of the bankrupt's estate was sold to the Piedmont Coal Company, and that as part of the said sale the purchasers agreed to pay to the Creditors' Committee in full for the services of the Creditors Committee and counsel, a sum not to exceed $360,00, and that from said sum the plaintiff has received and will receive a large amount of money in full [fol. 84] for any and all services rendered by him in connection with the Thompson estate, both before the adjudication in bankruptcy and subsequent thereto.

4. That the agreement set forth in the amended complaint that the defendants would collaborate with and act under the direction of the plaintiff's alleged assignor and would act for the plaintiff's alleged assignor and the interests represented by him and would receive out of the allowance to be made to them as general counsel for the Trustees such allowance as plaintiff's assignor should determine would have been, if any such agreement had been made, against public policy, a fraud upon the Trustees and illegal, null and void.

5. Defendants further contended in their briefs and upon the argument that the contract relied upon was vague and indefinite and therefore unenforcible.

A great mass of testimony, both oral and documentary, was presented to the Referee, much of which seems to be irrelevant or only dimly connected with the main issues involved. That there was some arrangement between the

plaintiff and the defendants with regard to compensation in connection with the Thompson estate is admitted. That some arrangement or agreement existed with respect to the division of the fees paid by the Trustees to their counsel in connection with the Frick sale, in which plaintiff's assignor was to share, also is not denied.

The sole issue of fact seems to be:

What was the nature of the arrangement or agreement between the parties? Did it conform to the agreement as [fol. 85] alleged by the plaintiff? Or did it any way fall short of this?

If the Referee should find that an agreement existed conforming to the allegations of the complaint, then the questions of law arise:

a. Is such agreement valid and enforcible, or must it be held to be contrary to public policy and therefore void; or

b. Is it so vague and uncertain as to be incapable of enforcement?

Should these questions be determined favorably to plaintiff, then only will arise the question of the amount involved.

The evidence of the agreement submitted by the plaintiff consists of conversations between him and the defendant Weil and of correspondence between the plaintiff or those associated with him and the defendant Weil and others in his office. Most of this correspondence deals with matters in connection with the affairs of the estate and may be disregarded except as it shows the close association between the plaintiff and the defendants in matters concerned with this estate, particularly in regard to the sales of the bankrupt's property. There is also certain correspondence between the defendant and Mr. Louis Marshall, who was and still is associated with the plaintiff, which took place subsequent to the time when this controversy first arose. This correspondence was introduced upon the theory that it contained admissions upon the part of the defendant of the existence of the contract. An examination of it, however, leads the Referee to the conclusion that in it the defendant for the most part denies the making of the contract, and that therefore this part of the correspondence is [fol. 86] irrelevant and should have been excluded, except

as to a few statements in certain letters which will hereafter be specifically referred to.

The Referee has come to the conclusion that a contract substantially as alleged by the plaintiff did exist. The pertinent evidence leading to this conclusion is as follows:

The first interview between Mr. Weil and Mr. Untermyer took place in the latter part of August, 1917. At this interview Mr. Untermyer testified that he stated to Mr. Weil what he had previously stated on the record with regard to the affairs of the Josiah V. Thompson estate. This in substance was that in the Autumn of 1915 Mr. Untermyer was approached by Mr. Scrugham, who subsequently became one of the Trustees in Bankruptcy of Josiah V. Thompson, to interest himself in the affairs of Mr. Thompson. It appeared that Mr. Thompson owned a great amount of coal properties in Pennsylvania and West Virginia and was President and practically the only owner of the leading bank at Uniontown, Pa. He had interests in about 275,000 acres of coal land, partly developed and partly undeveloped. About 30,000 acres of this he owned alone, and in the balance he had various fractional interests, there being about seven hundred associates in the ownership of the property. His affairs had become much involved and Receivers had been appointed of his property in the Court of Common Pleas in Fayette, Pennsylvania in January, 1915. There were mortgages on the property aggregating some $19,000,000. Most of these mortgages were past due and the unsecured creditors were threatening suit. The estate was in great danger of disintegration. The un- [fol. 87] secured creditors were about fifteen hundred in number, with claims aggregating over $15,000,000. At Scrugham's request, Mr. Untermyer went to Uniontown and held a large meeting of creditors. He suggested the formation of a committee with drastic powers, with the object of seeing if foreclosures of mortgages and other liens could not be stayed and the property saved. Such committee was formed under a Creditors' Committee Agreement dated January 31, 1916. Mr. Untermyer alleges that 95% of the $15,000,000 unsecured claims were deposited under the agreement. The exact percentage of the claims is not admitted by the defendant, but it is conceded that a very large proportion of the claims, not less than 90%, were

deposited with the Committee. It was contemplated under this agreement that bankruptcy proceedings might be necessary. "During all this time" (that is, up to the interview with Mr. Weil) "we (referring to the Creditors Committee) were negotiating for the sale of these properties." A contract for the sale of all the properties had been negotiated with one Ralph Young, connected with the Louis Hill interests of Minneapolis, the negotiations going so far as the making of an agreement subject to certain further investigations. This agreement was dated June 2, 1917, and was still pending when the bankruptcy proceedings were begun. It included all of the properties except the bank building in Uniontown. It appears that the Supreme Court of Pennsylvania held the receivership proceedings in the State Court to be invalid and it was at this point that Mr. Untermyer called upon Mr. Weil for aid. As to this interview, which took place in New York on or about August 21, 1917, Mr. Untermyer states in part as follows:

[fol. 88] "I asked Mr. Weil whether he knew anything about the Thompson Estate, and he said he did not, he had had no connection with it in any direction. I explained to him all that we had done. My recollection is that at that time I showed him the Young Hill agreement, and either I or Mr. Wickwire" (an associate of Mr. Untermyer) "showed him such papers as we had; I am not sure whether we gave him any papers at that time or not. I told him that I had concluded that we would have to go into bankruptcy, that we represented practically all the unsecured creditors, and that I therefore anticipated no great difficulty in the bankruptcy proceeding or in the selection of a trustee. I told him we wanted Mr. Scrugham as trustee * * * that I did not expect the bankruptcy proceedings to be very protracted because I had great hopes of the Young agreement being carried out, and that if carried out it would assure a composition in bankruptcy, but that it might not be carried out, that we had had so many disappointments with respect to selling property of this estate that it might not be carried out. I told him I very strongly suspected that the Frick interests were behind the contract; * * * I said to Mr. Weil in substance that I wanted him to represent me and the interests I represented in that bankruptcy proceedings. * * * I told him of the

provision in the agreement for compensation to the creditors committee and its counsel, and asked him whether he would be willing to act. He said he would be glad to act. I said to him that as I contemplated that this deal might go through in composition I was willing that his compen- [fol. 89] sation should be fixed at $5,000 for his services in connection with the bankruptcy proceedings. He expressed himself as entirely satisfied with that arrangement or with any other arrangement that I might see fit to make. He was very nice about it and said he was entirely at our service, and that the question of compensation would rest entirely with me. * * * I asked him whether he thought $5,000 was fair, and he said he thought it would be fair for his services in connection with the bankruptcy proceedings."

There is no substantial difference between Mr. Untermyer and Mr. Weil in regard to this first interview. Mr. Weil says in regard to it:

"He stated to me at that interview * * * that he was the counsel for the creditors' committee; that the receivers had been appointed for the J. V. Thompson estate; that the Supreme Court of Pennsylvania had discharged the receivers and that in consequence there were foreclosures on mortgages being made, sales on execution under judgments and under attachments and other proceedings which tended to disintegrate and dispose of the estate in parcels. And he wanted to have an application in bankruptcy made to have Mr. Thompson adjudicated a bankrupt so as to preserve the estate from disintegration, and he wanted me to file this application on behalf of creditors. He stated at the same time that the creditors' committee had made a sale of the entire property to the Hill Syndicate, so called, parties from the West, and that in all probability we would not [fol. 90] have to even go to the length of an actual adjudication; that the sale was liable to be consummated almost any day, and they expected to consummate it very quickly; but that meanwhile he wanted applications made for injunctions and other proceedings taken to preserve the estate pending the consummation of the estate. He stated at the same time that he thought a payment of $5,000 for that service would be sufficient and asked me what I thought about it. I told him if that was all we had to do I was per-

fectly satisfied with that or any other amount that he might fix or think was proper."

The next interview on the subject of fees to which Mr. Untermyer testified was in New York, in September, 1917, after the 16th of that month. This was after the adjudication in bankruptcy, which occurred on the 10th day of September, 1917, but before the appointment of the Trustees and the selection of their counsel, which did not take place until October 18th of that year. Mr. Untermyer says of this interview that he wanted Mr. Weil to go on and do what he could to assist in the bankruptcy proceeding and reorganization and that if the composition did not go through and there was a general fight he did not expect the arrangement made as to the $5,000 compensation to be conclusive and that he, Weil, said if he went on he would leave it to Mr. Untermyer to say what he should get. "That he would act for me and was representing me, and that the whole subject would be left in my hands, and that he would be glad to leave it to me to say what he should receive."

Mr. Weil denies that this conversation or any part of it took place. Mr. Weil, however, in his letter to Mr. Marshall [fol. 91] of November 18, 1920 (Plaintiff's Exhibit 324) says:

"I do not know why he (referring to Mr. Untermyer) now refers to this $5,000, because he agreed with me that the changed conditions, of course, made that arrangement wholly inapplicable."

This sentence was called to his attention by his counsel and the question asked, "Did you have any talk with Mr. Wickwire about that?" Mr. Wickmire was Mr. Untermyer's assistant. His answer was "Yes", at his office in Pittsburgh some time prior to the appointment of their firm as general counsel to the Trustees. He says:

"I called his (Mr. Wickwire's) attention to the immense amount of work we were doing in connection with those injunction proceedings * * * and stated to him the agreement which had been made which has been testified to."

(Obviously referring to the first agreement made at the end of August, 1917, for the $5,000 compensation.) He further says:

"I asked Mr. Wickwire to report this conversation that I have referred to to Mr. Untermyer, and the next time he came to Pittsburgh he made the statement to me simply Mr. Untermyer agreed to that fully, that he understood the situation and was perfectly satisfied that the $5,000 amount was not sufficient to cover the services that we had rendered."

Whether, therefore, the conversation occurred between Mr. Untermyer or through Mr. Wickwire, as Mr. Weil testifies, [fol. 92] it is obvious that at this point and as subsequently interpreted by Mr. Weil, the compensation to Mr. Weil was not to be limited to $5,000.

The Referee's conclusion of the purpose of the retainer by Mr. Weil, as shown by the testimony at this point, is substantially as follows:

Mr. Untermyer's object was to keep the estate together until the property could be disposed of and until that could be accomplished to prevent the disintegration of the estate by the foreclosure of mortgages or judgment or other liens. At this time it was hoped and expected that the Young or Hill contract, which contemplated a sale of the entire property, would go through and that a composition of creditors would follow. Mr. Weil's retainer was obviously on behalf of the Creditors' Committee and his actions would be subject to Mr. Untermyer's direction and he was to receive as compensation such amount as Mr. Untermyer should see fit, which was understood to be in excess of $5,000. It seems clear that at this point there was no arrangement as to who was to be counsel for the Trustees and no provision as to who the Trustee or Trustees were to be, the only discussion on this point being Mr. Untermyer's instructions to Mr. Weil to use his efforts to have Mr. Scrugham appointed sole Trustee, to which there could be no objection in view of the fact that Mr. Untermyer was acting for those in control of a very large proportion of the creditors. If the agreement stood at this point alone, without any further evidence as to the application of the arrangement to allowances or payments made by the Trustees to their counsel, it would seem that it must have referred only to payments for compensation to be made by the Creditors' Committee. [fol. 93] It was not expected that the Trustees or their counsel would have much to do and that the sales of the

property could go through promptly. The real purpose of the arrangement, however, was based upon the bankruptcy proceedings being the means for holding the estate together until the sales could be consummated, and Mr. Weil was employed for the purpose of doing whatever might seem to be necessary in the bankruptcy proceedings to accomplish that end. While it is true that at this time the only fees that have been under consideration were such as might be paid by the Creditors' Committee, nevertheless, in view of the general purpose of the agreement, this arrangment could properly be applied to fees subsequently allowed to the Trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees.

Upon this point it becomes necessary to examine the correspondence which took place at or about the time that the first allowance to the Trustees was in contemplation and was made. On the 17th of October, 1918, three Trustees were appointed—Mr. Scrugman, Mr. Hite and Mr. Hertzog. They promptly selected as their counsel Weil & Thorp, Waitman H. Conaway and Umbel, Robinson, McKean & Williams. It further appears that no progress was made with the sale of the property as a whole under the so-called Young-Hill deal but that a portion of the property was sold by the Trustees under a contract known as the Frick contract. This contract had been carved out of the Hill sale and had been entered into by the Creditors' Committee prior to the appointment of the Trustees in Bankruptcy. [fol. 94] It was immediately adopted by the Trustees in Bankruptcy and was finally consummated. The correspondence on the subject of compensation at or about the time of the consummation of the Frick sale began with a letter from Mr. Weil to Mr. Wickwire, April 19, 1918 (Plaintiff's Exhibit 129) in which he says:

"I have suggested to Judge Umbel and to the Trustees that we get together early next week and determine the amount of the fees of counsel, and counsel will have to agree upon the distribution thereof * * * Of course these fees will be limited to the services in connection with the Frick sale. * * * In fixing these fees I ought to know whether or not you expect us to provide for a payment to

you out of these fees. In other words, how shall your firm and our firm participate in these fees. What are your ideas and those of Mr. Untermyer on the subject? They will have to be included, I apprehend, in allowances to us, and the settlement will be between yourselves and ourselves, as I do not see how your firm could be directly allowed compensation as attorneys for the Trustees."

Mr. Wickwire answers to this in part—Letter of April 22, 1918 (Plaintiff's Exhibit 130):

"The Frick sale has by consent been carved out of the Hill deal, and as the consideration is a substantial one, a part of our compensation should be received from this partial sale of the estate. As to how this should be worked out, I desire to refer the matter to Mr. Untermyer. Whether we should be directly recognized and compensated in the proceeding, or whether we should participate in an [fol. 95] allowance to be made to you as the chief counsel for the Trustees in Bankruptcy (pursuant to the understanding that you were to serve in this capacity for Mr. Untermyer's account), are questions that I think should be settled by you and Mr. Untermyer."

The words in parenthesis are important. There is no direct testimony so far in the evidence on this point other than the general fact that the first retainer was to do what might be necessary in connection with the bankruptcy proceedings to consummate the general plans of the Creditors' Committee. Mr. Weil's answer to Mr. Wickwire—April 23, 1918 (Plaintiff's Exhibit 131) contains the following:

"I have yours of the 22nd * * * I really cannot see how the compensation to you for the services you mention can be included in the allowance on this Frick sale. However, that may be worked out. Of course I mean an allowance to you directly. On the other hand, to include your allowance with the allowance to our firm as attorneys for the trustees—regardless of any question of division between ourselves—must not be in such a way as to place us in the impossible attitude of demanding too large a compensation, which would reflect upon and injure our firm. As to the division between ourselves, of course that is an entirely different matter without regard to the amount awarded."

Then comes the letter of April 26th from Mr. Wickwire to Mr. Weil (Plaintiff's Exhibit 133). This letter Mr. Weil denies receiving, but in his subsequent correspondence with [fol. 96] Mr. Marshall, Mr. Marshall quotes this letter practically entire, and in reply to Mr. Marshall's letter Mr. Weil twice states that he answers this correspondence with all of the previous correspondence before him. Although Mr. Weil also testifies that he did not read that portion of Mr. Marshall's letter which contained the extracts from the letter of April 26th, it seems apparent that his answer constitutes an admission of the receipt of the letter of April 26th. In this letter to Mr. Weil Mr. Wickwire writes in part as follows:

"It is my understanding that you originally made an arrangement with Mr. Untermyer to assist him in this business for a specified fee of $5,000.00. I assume from your letter that you entertain the view that on account of the amount of work which you have done you should not be limited to this figure, and I may say that I, personally, would entertain the same opinion."

(This statement would seem to indicate that the arrangement as to compensation in addition to the $5,000 was made with Mr. Untermyer and not with Mr. Wickwire.)

"In your letter, however, of the 19th inst., you refer to the counsel fees payable in respect to the Frick deal, and you say:

'In fixing these fees I should like to know whether or not you expect us to provide for a payment to you out of these fees? In other words, how shall your firm and our firm participate in these fees?' etc.

"It occurs to me that one not familiar with the situation might derive an erroneous impression from the language [fol. 97] which you have used and which I am sure does not reflect your actual intentions.

The business, of course, was Mr. Untermyer's and in asking you to represent him in it it was contemplated that the fees received would be for Mr. Untermyer's account and that, as you will remember, was the express understanding between us on the subject • • •

Any amount which would be formally allowed to you would naturally be received for Mr. Untermyer's account

and subject to an adjustment between you. The amount to which you would be entitled being $5,000 and such further sum as under the circumstances he would deem just and equitable."

Mr. Weil does not answer this letter directly, but in his letter of April 29th to Mr. Wickwire it appears that he expects to seem Mr. Untermyer in Philadelphia on Thursday morning, and says:

"I wish you would talk this matter (that is compensation) over with Mr. Untermyer and I will be glad to discuss it with him when I see him in Philadelphia."

Mr. Weil and Mr. Untermyer did meet in Philadelphia early in May 1918 at a hearing before the Circuit Court of Appeals connected with the Thompson estate. Mr. Untermyer and Mr. Weil differ radically as to the substance of their conversation at this time, but one fact stands out as admitted by both parties, which is that Mr. Untermyer expressed his dissatisfaction at Mr. Weil's attitude in regard to the fees of counsel to the Trustees. Upon his return to Pittsburgh and under date of May 7, 1918 (Plaintiff's Ex-
[fol. 98] hibit 144), Mr. Weil wrote to Mr. Untermyer as follows:

"I have just returned home this morning. I have not yet recovered from my amazement at your construction of my letter to Wickwire of the 19th, and of the 23rd in reply to his on the 22nd, in relation to fees. You have taken all of the heart out of me in relation to this case. If you think, as you implied in your statement to me, that I was trying to swindle you out of your fees, I would not want to longer continue in the case as associate counsel with one entertaining such an opinion of myself. I am perfectly willing to retire, waiving all claims of compensation for services previously rendered.

On April 19th I called Mr. Wickwire's attention to the amount of money available for distribution for fees and expenses of the Frick sale, and expressed the opinion that no fees could be allowed except for services in connection with the Frick sale. I called attention to the fact that your fees would have to be included, in my opinion, with ours, in these words:

'In fixing these fees, I ought to know whether or not you expect us to provide for a payment to you out of these fees. In other words, how shall your firm and our firm participate in these fees. What are your ideas and those of Mr. Untermyer on the subject? They will have to be included, I apprehend, in allowance to us, and the settlement will be between yourselves and ourselves, as I do not see how your firm could be directly compensated as attorney for the trustees.'

[fol. 99] I do not think that the language admits of any other construction than that intended. Your firm was entitled to compensation wholly separate and apart from ourselves, but I did not see how those services could be allowed for out of this sale.

As to the allowances to us as attorneys for the trustees, of course you were to participate, and the settlement, that is, the amount to be allowed to us, was to be arranged between yourselves and ourselves. The only question raised was as to how your firm could be directly compensated as attorneys for the trustees. There is nothing whatever in this letter that would justify any assumption on your part that we did not recognize your rights in connection with these allowances for fees to the attorneys for the trustees.''

He then quotes further from Mr. Wickwire's letter to him of the 22nd, and his reply of the 23rd as to how the application fo rallowance should be made, and says:

place us in the position of asking exorbitant fees • • •

plication for allowance should be made, and says:

''I then asked Mr. Wickwire to go over the matter with Mr. Untermyer and when he came here be prepared to act. Here again is brought out the thought of the first letter of an allowance to you directly, (in which I could have no possible interest,) for services rendered by you to this estate.

As to the allowance to us as attorneys for the trustees, we recognize, of course, as stated, that that was for our joint account, to be distributed in accordance with your wishes and with our agreement in the premises, the only qualification being that, as we recognized your rights to a [fol. 100] large compensation, I did not want this put under cover of payment to the attorneys for the trustees, and thus place us in the position of asking exorbitant fees • • •.

When we were appointed attorneys for the trustees, as Mr. Wickwire stated, I stated to him I understood, of course, that we were acting for you and were appointed practically as your representative"

Mr. Weil contends that this letter refers only to the Frick fees, but it cannot be limited to this narrow construction. The occasion it is true is the fixing of the allowances in connection with the Frick sale, but the language is far broader than that and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees. No special arrangement had yet been made as to the fixing of the Frick fees; Weil so testified; in fact, that was the matter under discussion, so when Mr. Weil says:

"As to the allowance to us as attorneys for the trustees, we recognize, of course, as stated, that that was for our joint account, to be distributed in accordance with your wishes and with our agreement in the premises"

he must refer to some previous agreement, and this agreement could only be the one made prior to the appointment of the Trustees which Mr. Weil now interprets to refer to compensation allowed by the Trustees. Mr. Weil carefully distinguishes between any compensation which might be allowed directly to Mr. Untermyer or his firm "in which I could have no possible interest" and the allowance made to [fol. 101] counsel for the Trustees in which he and Mr. Untermyer were to share. His recognition of the distinction between the compensation allowed to Mr. Untermyer directly, in which he has no interest, and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees would seem to dispose of the contention made by Mr. Weil in respect to the compensation to counsel of the Creditors' Committee allowed upon the consummation of the Peidmont sale which Mr. Weil contends would cover any interest which Mr. Untermyer might have in the fees allowed to counsel for the Trustees. This letter of May 7th set Mr. Untermyer's mind at rest, for he answers on May 9th (Plaintiff's Exhibit 145) in part as follows:

"I have reached the conclusion that you are right and I am wrong, and I hereby apologize. The facts out of which my misunderstanding of the situation arose are as follows:

As I was about leaving the office one afternoon Mr. Wickwire came to me and said that he had a letter from you in which you inquired whether our firm expected to be paid or provided for out of the fees that you were receiving in connection with the Frick matter. I told him I was astounded at such a suggestion; that I understood we were in charge of the business and that it was for Mr. Weil to inquire what part of the fees we thought he should receive rather than for him to ask whether we would be paid. I did not at that time see the letter, except that my attention was called to this paragraph in it:

[fol. 102] 'In fixing these fees I ought to know whether or not you expect us to provide for a payment to you out of these fees.'

Subsequently, Mr. Wickwire told me he sent me the letter but I had never read it until now. It is manifest from that letter that there is no difference between us and that in talking with you, I was under a grave misapprehension."

He then refers to another matter outstanding between them over which he states he is greatly incensed and which "has led me to the conclusion that the less our offices have to do with one another hereafter, the more comfortable it will be for both of us." This last statement Mr. Weil interprets as proof of his contention that whatever else may be said of the transaction up to this time, at least at this point the relations between the two firms were broken off. I cannot construe it as applying to the Thompson case, or if it did it was not carried into effect, because the correspondence between Mr. Weil and Mr. Untermyer's assistants in connection with the Thompson estate after this correspondence continued to be practically as active as before. Whatever may be said as to the exact terms of the agreement made prior to the appointment of the Trustees and its application to fees to be received by counsel for the Trustees not yet appointed as of the time it was made, it seems obvious that the parties by their correspondence just cited mutually agreed and understood that the original agreement was meant to and did apply to fees to be received by counsel for the Trustees and that it would not apply to fees to be received by Mr. Untermyer directly; with, how-

[fol. 103] ever, this further qualification, that the whole object sought to be accomplished by Mr. Untermyer and the Creditors' Committee was the preservation of the estate as against forced sales by mortgages, judgment creditors and other lienors and the sale of the properties by contract, and that when that object should be accomplished the arrangement would end.

The application to the court for allowance to counsel for the Trustees in connection with the Frick sale was asked for in the following way: Counsel for the Trustees asked for $75,000 for services in connection with the Frick sale to Messrs. Guggenheimer, Untermyer & Marshall, Weil & Thorp, Umbel, McKean & Robinson and Crago & Montgomery. The bill bore the annotation "Distribution of this amount among the respective counsel having been arranged between themselves by agreement." The bill is dated June 1, 1918. At the same time special application was made by Guggenheimer, Untermyer & Marshall, as attorneys for the Creditors' Committee, for $25,000. The separate bill of Guggenheimer, Untermyer & Marshall was disallowed by the Referee and the counsel for the Trustees was allowed $50,000. An appeal to the District Court for the Western District of Pennsylvania was taken. Judge Thompson affirmed the Referee, except that he reduced the fees of counsel for the Trustees from $50,000 to $40,000. The statement in the joint bill that the amount of compensation had been agreed upon by counsel does not seem to be quite accurate. It should have read "to be agreed upon by counsel," as there was considerable discussion afterwards by correspondence and otherwise of the distribution of the $40,000 finally allowed.

[fol. 104] It is the conclusion, therefore, of the Referee upon the question of fact that there was an agreement between the plaintiff and the defendant with respect to the distribution of the fees received by the defendants as counsel to the Trustees in the Thompson estate and that such agreement was that the amount of such fees when received should be divided in such manner as Mr. Untermyer should determine; this agreement covers the period from the beginning of the bankruptcy proceedings until the time when

the properties were sold, and applies to all fees received by the defendants from the Trustees during that period.

Defendants contend, however, that should the Referee find that any such agreement was made, the same is contrary to public policy, illegal and void and a fraud upon the Court and cite a number of cases dealing with contracts which have been held to be unenforcible on this ground. Obviously, it is the duty of the Trustee and of the Referee to scrutinize with particular care any contract which might lead either party thereto to neglect his duty to his client, particularly where such client is in any sense an officer of the court, such as a Trustee in Bankruptcy. At the same time, the Referee should not lightly hold an agreement between th parties to be illegal or against public policy which is capable of a construction which would make it consistent with the law and valid.

Curtis v. Gokey, 68 N. Y. 300.

In approaching this question, the Referee has considered the circumstances under which the agreement was made [fol. 105] and the purposes sought to be accomplished by the retainer of the defendants and which appear from the evidence.

These circumstances have already been referred to, but it will do no harm to summarize them again. For some two years the Creditors' Committee and the plaintiff had been seeking to preserve the property against the foreclosure of secured liens, in an effort to sell the property to the best advantage, and negotiations for such sales had also been carried on, with favorable prospects; an agreement covering one such sale had been consummated. This effort had been carried on under the protection of a receivership in the State Court of Pennsylvania. That receivership had been held invalid. It was decided that the only course available was to seek the protection of the Bankruptcy Court.

When, therefore, the retainer of the defendants was made, and the subsequent discussions on that subject are considered, it seems proper to consider them in the light of the objects which it was sought to accomplish and not to import into the agreement any purpose which would be inconsistent with that general purpose. Therefore, the Referee considers that the agreement and the interpreta-

tion put upon it by the parties at the time it was made and at the time of the Frick sale, were predicated upon services rendered and to be rendered, in connection with those purposes, namely, the preservation of the estate against foreclosure of secured liens, and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors. In this there was and could be no diversity of interest between the creditors represented by the Creditors' Committee and those not so represented.

[fol. 106] So construed, it seems that there was nothing necessarily illegal or contrary to public policy in the arrangement. Nor in the performance of the agreement do these bounds appear to have been overstepped. There was no conspiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a Trustee to be elected as was true in the case of Marsell v. Maires, 203 A. D. 646. At the time the arrangement was made the plaintiff represented 90% to 95% of the creditors. The interests which he represented were not adverse to the general creditors, for with only a small exception he represented the general creditors. The defendants were his representatives in Pennsylvania. When it came to the selection of Trustees, objection was made to the appointment of Mr. Scrugham, Mr. Untermyer's selection, as sole Trustee, and while there was some discussion as to whether or not this election could have been forced, an agreement was arrived at whereby three Trustees were appointed. Upon their appointment they selected counsel for the Trustees and seem to have gone out of their way to select counsel who already represented a large number of creditors. The defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors' Committee. Mr. Weil did not at the time he was appointed counsel for the Trustees disclaim that he was acting on behalf of the Creditors' Committee. In fact, he writes to Mr. Untermyer that he considers himself to have been appointed as Mr. Untermyer's representative and testifies that he considers that he continued to represent those interests until the Young-

[fol. 107] Hill deal fell through, which he says occurred

about May 1918. The affairs of this estate were very complicated, and the person most conversant with them from a legal aspect was Mr. Untermyer. The Trustees in selecting the defendants as their counsel must have realized that they were selecting for that position counsel of the Creditors' Committee, and could not have ignored their connection with the plaintiff.

While the courts have at times frowned upon the appointment of counsel for creditors to be counsel to the Trustees, this practice nevertheless has been frequently followed and is no ground for denying compensation.

It has been held that there is no legal objection to permitting the attorney for the Trustee to make and present proof of claim where the bankrupt estate is not prejudiced thereby. In re McKenna, 137 Fed. 611.

Matter of Tieje, (D. C. N. Y.) 263 Fed. 917, where the Court said:

"While counsel for the trustee also represents certain creditors of decedent, who are in most instances also creditors of the bankrupt, the master very properly observed that this should not operate to deny counsel fair compensation for services performed inuring to the benefit of all in interest. It must be kept in mind that all parties entitled to a share in this fund have been benefited in proportion by having this real estate converted into cash and the respective rights determined. It should be added that it is not uncommon for counsel for the trustee to represent creditors of the bankrupt."

[fol. 108] Least of all could such objection be raised in this case, where it appears that all but a small fraction of the creditors were represented by the particular counsel in question and that there was no different status between those creditors who had deposited their claims and those who had not. Moreover, the Trustees appear to have forestalled any complication on this ground by joining with the counsel for the Creditors' Committee to two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors' Committee. There was no reason to presume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between 95% of the creditors and a remaining 5% who stood in exactly the same

relation to the estate; and if such situation should arise, there were three counsel to the estate, the obvious duty of any one of whom, in such situation, would be to call the attention of the Court to the fact that in any particular instance it would be improper for him to act. In other words, Weil & Thorp were appointed counsel for the Trustees over Weil's own admission practically because they were counsel to the Creditors' Committee and acknowledged that they were appointed as such representatives.

The defendants were on the ground and it was their duty to call the attention of the Court to the arrangement which they had had with the plaintiff if that was necessary. In fact, when the application was made upon the Frick sale, the defendants saw no impropriety in the arrangement as applied to the fees to be received from that sale, but took care, as they properly should have taken care, to see that the Court was apprised that the fees to be paid to [fol. 109] counsel for the Trustees was divided between the various counsel, including also the plaintiff's firm. If the agreement which the plaintiff made applied, as the Referee believes it did, to fees other than the fees in the Frick sale, it was the defendant's duty to do whatever was necessary to bring that matter to the attention of the Court, and if he understood, as I believe he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees, he could and should have insisted that the subsequent applications to which that agreement applied should also have been made upon the plaintiff's behalf as well as on behalf of the other counsel. In other words, there was nothing in the original arrangement which was not susceptible of being legally carried out, and if it was the defendant's fault that *that* any appropriate steps were not taken to inform the Court of these facts, he cannot now be heard to plead that failure in his own behalf. Unquestionably, Weil & Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with this estate, which cannot be considered as rendered on behalf of the Creditors' Committee as distinguished from the creditors as a whole.

The defendants have pointed out a number of instances in which they claim that the interests of the Creditors' Committee were adverse to those of the general creditors and that they took a position adverse to the general creditors.

I do not find this to be the fact. The only matter of importance was in connection with proof of claims held by the Creditors' Committee, but the record clearly shows that the only action taken by the Creditors' Committee in this was:

1. To make the formal proof of the assignment of the claim to the Committee and they then referred to counsel [fol. 110] for the specific claimant any objection which might be made to the substance of the claim, and

2. To object that claims filed with the Creditors' Committee and proved in this way could not also be proved by the claimants independently.

I do not consider it important that the Creditors' Committee still continued to exist, which I think was the fact. It certainly fought for its existence when the Laidley suit was brought. The Committee consisted of men of importance and experience, who had knowledge of the situation. They represented a vast number of the creditors and their judgment upon any action with respect to the estate was useful and desirable. There is nothing in this, however, which indicates that their interest was in any way adverse to the other creditors. The plaintiff suggests that some plan of reorganization was or might have been in contemplation which would inure to the benefit of the Creditors' Committee as distinguished from the other creditors. The word "reorganization" does appear here and there through the testimony, but from the time of the commencement of the bankruptcy proceeding there seems to have been no plan and no suggestion of any reorganization in the sense of a sale to the Creditors' Committee. The whole effort both of the Trustees and the Creditors' Committee was to effectuate sales to outside parties which would result in the payment of prior liens and of cash which would be distributable among the creditors and which it would be impossible for the creditors represented by the Creditors' Committee to participate in in a manner different from those not represented by it. The Referee therefore considers that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the [fol. 111] creditors, whether represented by the Committee or not, nor was there any reason to suppose that any such

condition would arise, nor in fact did any such condition arise. The only potential diversity which would go to the effect of making the agreement under consideration invalid was that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors' Committee. This potential diversity would apply equally to other counsel for the Trustees, and as I read the evidence would apply to Mr. Weil himself, who did not cease to represent the Creditors' Committee upon his appointment as counsel to the Trustees. It is obvious that neither Mr. Untermyer nor Judge Umbel could represent the creditors whose claims had been filed in their behalf and also represent the Trustees at the same time. This must have been known to the Trustees when they appointed Judge Umbel and Mr. Weil as their counsel, and when such appointment was approved by the Court. The only objection that I can see to the contract was that it does not seem in terms to have been made known to the Court or to the Referee, but there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the arrangement as made that there would have been any objection to the plaintiff sharing in these fees. Certainly the Court's or the Referee's ignorance of the agreement did not tend to increase the allowances to counsel, nor is there anything but commendation by the Referee and the Court for the services rendered to the estate by counsel, in which the plaintiff bore a considerable part, whether or not that fact was known to the Court. In any event, it does not seem to me that the defendants can now contend that the failure to [fol. 112] bring this matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention.

The cases upon which defendant principally relies—Fried vs. Danziger, 120 A. D. 604, and Marsell vs. Maires, 203 A. D. 646—do not seem to me to apply. The cases involved a very different state of facts. In the latter case there was an agreement between the attorney for the Franklin Brewing Company, against which a petition in bankruptcy had been filed, and the plaintiff whereby the defendant requested the plaintiff to assist him in electing certain Trustees of the bankrupt corporation and thereafter to aid in procuring the appointment of the defendant as the attorney

for the Trustees; and in the event of his appointment as attorney for the Trustees to assist him in all matters which he might be called upon to do. In the event of such appointment the defendant was to pay the plaintiff one-third of all the fees and allowances that might be awarded or received by him. The Court says that:

"Clearly, the purpose of the agreement was to procure the election of certain trustees, whose primary and controlling qualification was that, when elected, they would appoint defendant their attorney to conduct the litigation of the estate * * *. The agreement in question, however, if at all effectual, tested the fitness of the trustees, whose election was to be procured, not by their qualifications as being men of intelligence, honesty and integrity, who would act solely in the interests of the creditors by whom they were elected, but the paramount and controlling consideration was that such trustees, and only such, would be elected, who would appoint the defendant their attorney."

[fol. 113] No such situation existed in the present case. There seems to have been no effort to have any Trustee appointed for any reason other than the best interests of the estate and the agreement was not directed to that end.

Again, the defendants contend that the agreement is vague and indefinite and therefore unenforcible. They cite numerous cases in which the terms of the contracts involved were so vague that it was impossible for the Court to find a method of determining the amount of compensation. It would seem that the defense of indefiniteness does not go to the validity of the contract but to the ability of the Court to enforce it. In the case of McDonald vs. Acker, Merrall & Condit, 192 A. D. 123, where it was held that an agreement to pay "a liberal and very substantial bonus" in addition to a stated salary is too vague, indefinite and uncertain to form the basis of a recovery. If, however, the agreement had been to pay a liberal and substantial bonus to be determined by a person named, and such person had made his determination, there would seem to be no reason why such a contract could not be enforced. The mere fact that the person who makes the determination is one of the parties to the contract and such interest is known and no fraud or bad faith is shown does not limit the power of the Court

to act. The present case seems to come within the reason of the decision in New England Trust Company vs. Abbott, 162 Mass. 248, where the contract provided for the transfer to a corporation of the stock of a stockholder at a price to be fixed by the directors. So here, the agreement that the amount to be allowed to the defendants was to be as much as Mr. Untermyer should fix, Mr. Untermyer having fixed [fol. 114] the amount due, would seem to be enforcible in the absence of fraud or bad faith.

An allowance was made to the counsel for the Trustees after the completion of the Piedmont sale and covering the services theretofore rendered. On September 20, 1920, Mr. Weil reports the allowance by the Court of substantially $300,000 on all the sales which had been made up to and including the Piedmont sale, which wound up the Estate. The proportion going to Weil & Thorp was about $140,000, actually $142,659.98, and in his letter to Mr. Marshall of February 23rd he states that they have 7/15ths of the $300,000, or $140,000, the other 8/15ths going to the other counsel. Up to this point, Mr. Untermyer had never made any determination as to the proportion of the fees received by Weil & Thorp which was to go to Weil & Thorp and to him. Obviously, the amount due to him could not be paid until he made such determination. This decision seems to have been indicated to Mr. Weil for the first time in Mr. Marshall's letter to him of November 15, 1920, in which he says:

"Sam takes the view that he is entitled to a minimum of forty per cent."

As the contract has been construed in this opinion, it was made for the purpose of preserving the estate until the property could be sold, and it seems, therefore, that the arrangement between the parties ended when the final sale was complete, so that, from anything that appears, the only portion of the allowances made to the Trustees in which Mr. Untermyer would have an interest are those covered by the $300,000 payments to the counsel of the Trustees. In any event, it is clear that Mr. Untermyer has [fol. 115] made no determination as to the proportion which he should receive in respect to any of the fees paid since these payments. It does not follow that, because he de-

termined that he was entitled to 40% of the $142,659.98 received by the defendants up to this time, that he would determine that he was entitled to receive the same percentage with regard to fees received by them subsequent to that date. The nature of the services for which the subsequent fees were paid were not known or presented to him until this action was under trial and do not at any time appear to have been considered by him. His determination, however, as to the proportion which he was to receive from the $142,659.98 payment seems to be conclusive in the absence of fraud or bad faith, and the Referee cannot say that such a decision, even in view of the fact that he had received other compensation specially allowed on the Piedmont sale to the Creditors' Committee and their counsel, was improper or excessive. Until the determination by Mr. Untermyer, no amount was due and no interest would run on such amount. Therefore, the Referee finds that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale. The sum of these amounts is $142,659.98, forty per cent of which is $57,064.

The Referee therefore finds that the plaintiff is entitled to recover from the defendants the sum of $57,064, with interest from November 15, 1920.

Allan Wardwell, Referee.

[fol. 116] In United States District Court

[Title omitted]

Defendants' Exceptions to Referee's Proposed Report

The defendants, A. Leo Weil and Charles M. Thorp, by Stein & Salant, their attorneys, Carter, Ledyard & Milburn, of Counsel, take the following Exceptions to the Proposed Report of the Referee, to whom this case has been referred by an order heretofore made herein, which Report, undated, was delivered to the attorneys for the parties herein on the 6th day of November, 1925, to wit:

1. For that the said Referee erroneously found and stated in the said Proposed Report that a contract substantially as alleged by the plaintiff did exist; whereas he should have found from the pleadings and the evidence, as he in fact states in his Proposed Report, that no contract such as that alleged in the complaint or in the amended complaint did in fact exist; and he should further have found from the [fol. 117] evidence that no such contract as claimed by plaintiff was ever made or did in fact exist.

2. For that the said Referee erroneously found and stated in the said Proposed Report that "this arrangement" (meaning thereby the arrangement made between Samuel Untermyer and the defendants in August and September, 1917), "could properly be applied to fees subsequently allowed to the trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees"; whereas he should have found from the pleadings and the evidence that the said arrangement was by its terms and by its purpose and intent limited to the fees to be paid to the defendants by the Creditors' Committee for services rendered by the defendants as attorneys and counsel for the Creditors' Committee up to the time that the defendants were appointed as general counsel to the trustees; and whereas he should have found from the pleadings and the evidence and from the terms and nature of said arrangement, that the said arrangement did not include or refer to any fees to the defendants as general counsel to the trustees that might be paid or allowed by the trustees and the court.

3. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's subsequent correspondence with Mr. Marshall constitutes an admission of the receipt by him of Mr. Wickwire's letter of April 26, 1918, Plaintiff's Exhibit 133; whereas he should have found from the evidence that the said letter of Mr. [fol. 118] Wickwire, dated April 26, 1918, Plaintiff's Exhibit 133, was not received by the defendant.

4. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's letter to Mr. Untermyer, dated May 7, 1918, Plaintiff's Ex-

hibit 144, cannot be limited to the construction that the said letter referred only to the Frick fees; whereas he should have found from the said letter and from the evidence that the said letter did in truth and fact refer to the Frick fees only, the only fees then under discussion.

5. For that the said Referee erroneously found and stated in the said Proposed Report that the language of the said letter dated May 7, 1918, Plaintiff's Exhibit 144, is far broader than the fixing of the allowances in connection with the Frick sale and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees; whereas he should have found from the said letter and from the evidence that the language of the said letter was limited to the fixing of the allowances in connection with the Frick sale and refers to an arrangement between the parties with regard to the allowances in connection with the Frick sale and to those allowances only, even though the language, unexplained by the conditions under which it was written, might be given a broader construction.

6. For that the said Referee erroneously found and stated in the said Proposed Report that at the time of the writing [fol. 119] of the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, no special arrangement had yet been made as to the fixing of the Frick fees; whereas he should have found from the evidence that a special arrangement had then and theretofore been made as to the fixing of the Frick fees, to wit, that after there had been paid and distributed to the associate counsel to the Trustees their respective proportions of the joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to be divided between the said Untermyer's firm and the defendants in such proportion as the said Samuel Untermyer would designate.

7. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement referred to by the defendant Weil in the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, could only be the agreement made prior to the appointment of the Trustees, which Mr. Weil now interprets to refer to compensation allowed by the

Trustees; whereas he should have found from the evidence that the agreement referred to in the said letter, by reason of the difference in terms and parties and services to be rendered, could not refer to the services to be rendered by defendants to the trustees but referred to the special arrangement made after the Frick sale had been consummated by the Trustees, whereby, after there had been paid and distributed to the associate counsel to the Trustees their respective proportions of the joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to [fol. 120] be divided between the said Untermyer's firm and the defendants in such proportion as the said Untermyer would designate.

8. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest, and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, disposes of the contention made by Mr. Weil in respect to the compensation to the counsel of the Creditors' Committee allowed upon the consummation of the Piedmont sale; whereas he should have found that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, referred solely to the distinction between, on the one hand, the compensation to be allowed to the said Untermyer directly upon his separate application (which was made) for fees and compensation for services rendered by the said Untermyer for the preservation of the estate prior to the bankruptcy, and on the other hand, Mr. Untermyer's interest in the fees to be allowed to the counsel of the trustees jointly, including the said Untermyer's firm, upon their joint application for fees for services in connection with the Frick sale; and whereas he should have found from the evidence that the compensation to counsel of the Creditors' Committee allowed upon the consummation of the Piedmont sale under the Piedmont contract, in express [fol. 121] terms included and covered any and all compensation to the said Untermyer for any services rendered and

assistance given by him to the Trustees after the appointment of the Trustees.

9. For that the said Referee erroneously found and stated in the said Proposed Report that the relations between the said Untermyer and his firm on the one hand and the defendants on the other hand were not broken off so far as the Thompson case was concerned by the correspondence which took place between the said Untermyer and the defendant Weil in May, 1918; whereas he should have found from the evidence and from the said correspondence that it was then mutually agreed between the said Untermyer and the said Weil that they and their respective firms should have no further relations with each other as associate counsel in the Thompson case or any other matter, their subsequent relations being not as associates, but the said Weil representing the trustees and the estate and said Untermyer and his firm representing the Creditors' Committee.

10. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement made between the said Untermyer and the said Weil by their mutual correspondence in May, 1918, that they and their respective firms should have no further relations did not apply to the Thompson case, or if it did, it was not carried into effect, because the correspondence between Mr. Weil and Mr. Untermyer's assistants in connection with the Thompson estate continued thereafter to be practically as active as before; whereas he should have found [fol. 122] from the evidence that the said agreement between the said Untermyer and the defendant Weil was carried into effect and applied to the Thompson case, and that whatever subsequent correspondence there was between the defendant Weil and the said Untermyer's assistants in connection with the Thompson estate thereafter was only such correspondence as the defendant Weil, acting as counsel to the Trustees, had with the assistants of said Untermyer acting as counsel to the Creditors' Committee.

11. For that the said Referee erroneously found and stated in the said Proposed Report that the parties by their correspondence just cited (meaning the correspondence which took place in April and May, 1918) mutually agreed

and understood that the original agreement was meant to and did apply to fees to be received by defendants as counsel for the Trustees; whereas he should have found from the evidence that the parties by their said correspondence did not agree or understand that the original agreement was meant to apply or did apply to fees to be received by defendants as counsel for the trustees; and whereas he should have found from the evidence that the parties by their said correspondence were discussing and referring to the division of fees to be allowed upon the joint petition and application of themselves and the associate counsel to the Trustees in connection with the Frick sale and to these fees only.

12. For that the said Referee erroneously found and stated in the said Proposed Report that there was an agreement between the plaintiff (meaning the said Untermyer) and the defendant with respect to the [fol. 123] distribution of the fees received by the defendants as counsel to the Trustees in the Thompson Estate and that such agreement was that the amount of such fees, when received, should be divided in such manner as Mr. Untermyer should determine, and that this agreement covered the period from the beginning of the bankruptcy proceedings until the time when the properties were sold, and applied to all fees received by the defendants from the trustees during that period; whereas he should have found from the pleadings and the evidence that the only agreement between the said Untermyer and the defendants with respect to the distribution of any fees received by the defendants as counsel to the Trustees was the agreement heretofore referred to with reference to the Frick fees and those fees only.

13. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement claimed by the plaintiff was predicated upon services rendered and to be rendered in connection with the preservation of the estate against foreclosures of secured liens and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors; whereas he should have found from the pleadings and the evidence that the alleged agreement as claimed by the plaintiff was also predicated upon services rendered and to be

rendered by the defendants in connection with securing the appointment of a Trustee named by the said Untermyer, also in connection with obtaining the appointment of counsel to the Trustees who would as such counsel act under the orders and directions of the said Untermyer, and who [fol. 124] would so act under said Untermyer in connection with all matters pertaining to the Thompson estate, and that it was part and parcel of the said agreement alleged by said Untermyer that all such services were to be rendered by the said counsel would be under the orders and directions of the said Untermyer.

14. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing necessarily illegal or contrary to public policy in the arrangement as claimed by the said Untermyer and as construed by the said Referee; whereas he should have found from the pleadings and the evidence that under the arrangement as claimed by the said Untermyer and as found by the Referee, the defendants, though appointed by the trustees and confirmed by the court, and under the circumstances peculiarly the officers of the court in a most confidential relationship, were nevertheless to subject themselves in the performance of their duties as counsel to the Trustees, to the orders and directions of the said Untermyer, instead of to the orders and directions of the Trustees and of the Court, and he should therefore further have found that the said alleged arrangement, by reason of the fraud and because of its temptations and tendencies, was illegal, unprofessional, contrary to public policy, null and void.

15. For that the said Referee erroneously found and stated in the said Proposed Report that there was no con- [fol. 125] spiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a Trustee to be elected; whereas he should have found from the evidence that under the alleged arrangement as claimed by the said Untermyer it was part and parcel of the alleged arrangement that George R. Scrugham should be appointed sole Trustee, that claims should be collected for that purpose, and that the defendants should be appointed counsel to the Trustees to be elected, and that the defendants

agreed that, upon their appointment as such counsel, they would act under the directions and orders of the said Untermyer; and he should therefore further have found that the said alleged arrangement was illegal, unprofessional, contrary to public policy, null and void.

16. For that the said Referee erroneously found and stated in the said Proposed Report that the interests which the said Untermyer represented were not adverse to the general creditors; whereas he should have found that the interests of creditors whom the said Untermyer represented were in some respects adverse to the interests of the other general creditors and adverse to the interests of the Trustees, in that the Creditors' Committee which the said Untermyer represented were the owners of certain claims which it was to the interest of the Trustees and of the other general creditors who had not assigned their claims to the Creditors' Committee, to oppose and defeat and which claims the Trustees through the defendants and their other counsel, did oppose and defeat.

[fol. 126] 17. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees seem to have gone out of their way to select counsel who already represented a large number of creditors and that the defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors' Committee; whereas he should have found from the evidence that all representation by the said counsel for creditors and any representation by the defendants in behalf of the said Untermyer and with respect to those creditors who had deposited their claims with the Creditors' Committee ceased and came to an end upon their appointment as counsel for the Trustees.

18. For that the said Referee erroneously found and stated in the said Proposed Report that Mr Weil did not at the time he was appointed counsel to the Trustees disclaim that he was acting on behalf of the Creditors' Committee; whereas he should have found from the evidence that Mr. Weil and the defendants did specifically at the time state in writing to, and file with, the Referee and to and

with the Court, a statement to the effect that upon their appointment as general counsel to the Trustees they ceased to represent and no longer represented the Creditors' Committee.

19. For that the said Referee erroneously found and stated in the said Proposed Report that Mr. Weil wrote to Mr. Untermyer that he considered himself to have been appointed as Mr. Untermyer's representative and testified that he considered that he continued to represent those interests until the Young-Hill deal fell through; whereas [fol. 127] he should have found from the evidence that what Mr. Weil wrote and meant by the term "representative" was that he was representing, in accord with Mr. Untermyer and with the Creditors' Committee, the same general purpose to put through the Frick and Young-Hill deals, believing them to be desirable and for the best interests of all the creditors and that he was therefore favorable to the carrying out of those deals.

20. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees appear to have forestalled any complication on this ground (meaning the ground that the defendants were counsel to the Creditors' Committee) by joining with the counsel for the Creditors' Committee two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors' Committee; whereas he should have found from the evidence that when the defendants were appointed as counsel to the Trustees, they ceased to represent the Creditors' Committee, and he should further have found that the appointment of the two other counsel to the Trustees had nothing whatever to do with the fact that the defendants had previously been counsel to the Creditors' Committee.

21. For that the said Referee erroneously found and stated in the said Proposed Report that there was no reason to presume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between the Creditors' Committee and the creditors who had not deposited their claims with the Creditors' [fol. 128] Committee; whereas he should have found from the evidence that there was at all times the possibility and

the probability, well known to all of the parties, that some of the claims represented by the Creditors' Committee would be opposed by the Trustees and by the other creditors, and that they were in fact so opposed by the Trustees and by the other creditors and were defeated; and whereas he should further have found from the evidence that under the alleged arrangement as claimed by the said Untermyer and as found by the Referee the defendants would have been bound upon any issue as to such claims deposited with the Creditors' Committee, to act under the directions and orders of the said Untermyer, and as counsel to the Trustees could have been ordered by said Untermyer not to oppose said claims, and that the said alleged arrangement was therefore illegal, unprofessional, contrary to public policy, null and void.

22. For that the said Referee erroneously found and stated in the said Proposed Report that the defendants were on the ground and it was their duty to call the attention of the Court to the arrangement (meaning the arrangement as claimed by the plaintiff) which they had had with the plaintiff (meaning the said Untermyer) if that was necessary; whereas he should have found from the evidence, and did in fact so find, that at the time when the defendants were appointed general counsel to the Trustees there was no such arrangement in existence as that claimed by the plaintiff (the said Referee having assumed the making of said arrangement by the subsequent corre-[fol. 129] spondence), and there was consequently nothing to which the Court's attention could be called; and whereas he should further have found from the evidence and from the law that if such an agreement or arrangement was made as that claimed by the plaintiff, it was illegal, unprofessional, contrary to public policy, null and void, and that the failure to call it to the attention of the Court did not cure its illegal, unprofessional and void character; Justice, for its own protection, and not for the benefit of the parties, striking down all such contracts when the same are brought to its notice.

23. For that the said Referee erroneously found and stated in the said Proposed Report that if the agreement which the plaintiff made applied, as the Referee believes it

did, to fees other than the fees in the Frick sale, it was the defendants' duty to do whatever was necessary to bring that matter to the attention of the Court; whereas he should have found from the evidence and from the law that if the said alleged agreement applied to fees other than the fees in the Frick sale, it was the duty of the said Untermyer who was to have benefited thereby to do whatever was necessary to validate the contract and therefore to bring that matter to the attention of the Court; and whereas he should further have found from the evidence and from the law and for the protection of the administration of justice, that no alleged failure of anybody at the time to bring that matter to the attention of the Court could in any wise affect the illegal and unenforceable nature of that alleged agreement.

[fol. 130] 24. For that the said Referee erroneously found and stated in the said Proposed Report that if the defendant understood, as the Referee believes he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees, he could and should have insisted that the subsequent applications to which that agreement applied should have been made upon the plaintiff's (meaning the said Untermyer's) behalf as well as on behalf of the other counsel; whereas he should have found from the evidence and from the law that if the said Untermyer made an arrangement with the defendants applying to subsequent fees, it was the business and the duty of the said Untermyer to see to it, and he could and should have insisted, that the subsequent applications to which the alleged agreement applied should be made upon the said Untermyer's behalf as well as on behalf of the other counsel, and that this was not the duty and obligation of the defendants.

25. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing in the original arrangement which was not susceptible of being legally carried out, and if it was the defendant's fault that any appropriate steps were not taken to inform the Court of those facts, he cannot now be heard to plead that failure in his own behalf; whereas he should have found from the evidence and from the law that the original

arrangement as claimed by the plaintiff, regardless of whether or not it was susceptible of being legally carried out, if in its general tendency it was bad and if it opened the door to temptation, then the law refuses its recogni- [fol. 131] tion, and therefore the alleged arrangement was wholly illegal, unprofessional, contrary to public policy and null and void, and he should further have found from the evidence and from the law that the failure to inform the Court by either or both parties did not and could not cure the illegal, unprofessional and void character of said alleged arrangement, which the court would strike down for the protection of the administration of justice, whenever it found out the character of the arrangement.

26. For that the said Referee erroneously found and stated in the said Proposed Report that Weil and Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with the Thompson Estate, which cannot be considered as rendered on behalf of the Creditors' Committee as distinguished from the creditors as a whole; whereas he should have found from the evidence that Weil and Thorp availed themselves to a large extent of the plaintiff's (meaning the said Untermyer's) assistance and services only in connection with the Frick sale, and that any other assistance and services rendered by the said Untermyer after the appointment of the Trustees were so rendered by him as counsel to the Creditors' Committee and were fully compensated for by the provision for compensation to the Creditors' Committee and its counsel in the Piedmont Coal Company contract.

27. For that the said Referee erroneously found and stated in the said Proposed Report that the interests of the Creditors' Committee were not adverse to those of the [fol. 132] general creditors and that the Creditors' Committee did not take a position adverse to the general creditors; whereas he should have found from the evidence that the Creditors' Committee continued to remain as owner of certain claims deposited with and assigned to it, which the Trustees and their counsel and other creditors contested and defeated, and that as to such claims, the interests of the Creditors' Committee were adverse to the interests of the Trustees and the other creditors.

28. For that the said Referee erroneously found and stated in the said Proposed Report that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the creditors, whether represented by the Committee or not, nor was there any reason to suppose that any such condition would arise, nor in fact did any such condition arise; whereas he should have found from the evidence and from the law that at the time when the alleged agreement as claimed by the plaintiff was made, and at all subsequent times, there was a potential diversity of interest between the Creditors' Committee on the one hand and the Trustees and the other creditors on the other hand, which potentiality materialized as to certain creditors represented by said Untermyer; and whereas he should further have found from the evidence and from the law that it is the tendency of the said alleged agreement, and not necessarily some illegal act thereunder, that makes it illegal, unprofessional, contrary to public policy, null and void.

29. For that the said Referee erroneously found and {fol. 133} stated in the said Proposed Report that the potential diversity of interest, arising from the fact that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors' Committee, would apply to Mr. Weil himself, who did not cease to represent the Creditors' Committee upon his appointment as counsel to the Trustees; whereas he should have found from the evidence that the potential diversity of interest in no wise applied to Mr. Weil, and that Mr. Weil's retainer and employment by the Creditors' Committee terminated and came to an end upon his appointment as counsel to the Trustees.

30. For that the said Referee erroneously found and stated in the said Proposed Report that the only objection that he can see to the alleged contract as claimed by the plaintiff and as found by the Referee was that it does not seem in terms to have been made known to the Court or to the Referee in Bankruptcy; whereas he should have found from the evidence and from the law that the vital objections to the said alleged contract were and are (1) that it was part and parcel of the alleged contracts as claimed by

the plaintiff that defendants should bring about the selection of the said Untermyer's nominee as sole trustee, (2) that it was also part and parcel of the said alleged contract that defendants should then be appointed as general counsel to the trustees so selected under an agreement to turn over to the said Untermyer so much of the fees allowed them as such counsel as the said Untermyer would designate, (3) that under it the defendants, while acting as general counsel to the Trustees, agreed to subject themselves [fol. 134] to the orders and directions of the said Untermyer, (4) that the defendants would thereby have interests to advance in conflict with their obligations as counsel to the Trustees in that it would be to their interest to be subservient to the wishes, orders and directions of the said Untermyer since the said Untermyer was to determine the amount of their compensation, (5) that the said Untermyer would thereby have a selfish interest to advance in conflict with his duty to the Creditors' Committee in that it would be to his interest not to object to or oppose any applications that defendants might make for fees and allowances as general counsel to the Trustees, regardless of the amount and fairness of the fees and allowances applied for, (6) that the general tendency of any such agreement makes it illegal, unprofessional, contrary to public policy, null and void, because it is opposed to the interests of the public, opens the door to temptation, and makes it easy to contaminate the sources of justice.

31. For that the said Referee erroneously found and stated in the said Proposed Report that there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the alleged arrangement as claimed by the plaintiff and as found by the Referee there would have been any objection to the plaintiff sharing in these fees; whereas he should have found from the evidence and from the law that if the attention of the Court had been called to the alleged arrangement as claimed by the plaintiff, the said arrangement would have been declared to be illegal, unprofessional, contrary to public policy, null and void, and he should have found further, as [fol. 135] testified to by one of the trustees, that the witness would not have agreed to the appointment of said general

counsel had he known of any such arrangement as that now claimed by Mr. Untermyer to have been made.

32. For that the said Referee erroneously found and stated in the said Proposed Report that certainly the Court's or the Referee's (meaning the Referee in Bankruptcy) ignorance of the agreement did not tend to increase the allowances to counsel; whereas there is nothing in the evidence to show what allowances the Court and the Referee in Bankruptcy would have made to counsel to the Trustees if they had known that counsel to the Trustees had such an agreement with the said Untermyer as the plaintiff claims.

33. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff (meaning the plaintiff's assignor Samuel Untermyer) bore a considerable part in the performance of the services rendered to the estate by counsel for which the Referee and the court commended counsel; whereas he should have found from the evidence that the services for which the Referee and the court commended counsel were the services rendered by the duly appointed general and associate counsel to the Trustees and that no part thereof consisted of services rendered by the said Untermyer.

34. For that the said Referee erroneously found and stated in the said Proposed Report that it does not seem to him that the defendants can now contend that the failure [fol. 136] to bring this matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention; whereas he should have found from the evidence and from the law that any failure to bring the alleged agreement as claimed by the plaintiff to the attention of the Court did not and could not cure the illegal, unprofessional and void character of that agreement, which the court would refuse to enforce in the interest of justice.

35. For that the said Referee erroneously found and stated in the said Proposed Report that no such situation existed in the present case as in the case of Marsell v. Mairs, 203 App. Div. 646; whereas he should have found from the evidence and from the law that according to the alleged agreement as claimed by the plaintiff it was part and parcel of that alleged agreement to secure the appoint-

ment of George R. Scrugham as sole Trustee and the appointment of the defendants as counsel for the said Scrugham as sole Trustee, the defendants, however, while such counsel, to act as the representative of the said Untermyer and under the orders and directions of the said Untermyer.

36. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement as claimed by the said Untermyer and as found by the Referee was not vague, indefinite and unenforceable; whereas he should have found from the evidence and from the law that the said alleged agreement was vague, indefinite and unenforceable in that the division of the fees was subject to the determination of one of the parties to the [fol. 137] said alleged agreement, to wit, the said Untermyer.

37. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale; whereas he should have found from the pleadings and the evidence that the plaintiff is entitled to recover no sum whatsoever and that the plaintiff's complaint should be dismissed on the merits.

38. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover from the defendants the sum of $57,064 with interest from November 15, 1920; whereas he should have found from the pleadings and the evidence that the defendants are entitled to judgment dismissing the complaint upon the merits.

Dated New York, December 11, 1925.

Stein & Salant, Attorney for Defendants. Office & P. O. Address: 1328 Broadway, Borough of Manhattan, City of New York. Carter, Ledyard & Milburn, of Counsel for Defendants. Office & P. O. address: 54 Wall Street, Borough of Manhattan, City of New York.

[fol. 138] In United States District Court

[Title omitted]

Defendants' Proposed Findings of Fact and Conclusions of Law

The defendants, by Messrs. Stein & Salant, their attorneys, Messrs. Carter, Ledyard & Milburn, of counsel, respectfully request the Referee herein to make the following Findings of Fact and Conclusions of Law.

1. At all times hereinafter mentioned, Samuel Untermyer, the plaintiff's assignor, was engaged in the practice of law in the City of New York.

Found. A. W.

2. At all times hereinafter mentioned until on or about the 1st day of December, 1920, the defendants A. Leo Weil and Charles M. Thorp were copartners engaged in the practice of law in the City of Pittsburgh, Pennsylvania, under the firm name and style of Weil & Thorp.

Found. A. W.

3. In the autumn of 1915, Josiah V. Thompson owned a great amount of coal properties in Pennsylvania and West [fol. 139] Virginia and was president and practically the owner of the leading bank at Uniontown, Pennsylvania. He had interests in about 275,000 acres of coal lands partly developed and partly undeveloped. About 30,000 acres of this he owned alone and in the balance he had various fractional interests, there being about 700 associates in the ownership of the properties. His affairs had become much involved and receivers had been appointed of his property by the Court of Common Pleas of Fayette County, Pennsylvania, in January, 1915. There were mortgages on the properties aggregating about $19,000,000. The unsecured creditors were about 1,500 in number with claims aggregating over $15,000,000. Most of the mortgages were past due, the unsecured creditors were threatening suit, and the estate was in great danger of disintegration.

Found. A. W.

4. At the request of one George R. Scrugham, said Samuel Untermyer went to Uniontown, Pennsylvania, in the

autumn of 1915 and held a large meeting of creditors. He suggested the formation of a committee [with drastic powers] with the object of seeing if foreclosure of mortgages and other liens could not be stayed, suits prevented, and the property saved. Such a committee was formed under a Creditors' Committee Agreement dated January 31, 1916, and the said Samuel Untermyer was appointed the counsel for the said Creditors' Committee. A very large proportion of the claims of the unsecured creditors, exceeding [approximately] 90%, were not only deposited with the said Creditors' Committee under the said agree- [fol. 140] ment, but were assigned to said Committee [and it was given the same control thereof substantially as the prior owners had.

Found, except as to matter in brackets and as amended. A. W.

5. From the time of the formation of the said Committee, the Committee and its said counsel negotiated for the sale of all Thompson's various coal properties in bulk and a contract for the sale of all of the said Thompson's properties, except the bank building in Uniontown, Pennsylvania, was made with one Ralph Young, dated June 2, 1917, but the said contract was optional with the said Young and was conditional only. The said contract is variously referred to as the Young Option or the Hill Option.

Found. A. W.

6. In or about August, 1917, and while the said Young Option was still pending, the Supreme Court of Pennsylvania held the receivership proceedings instituted in the Court of Common Pleas of Fayette County [to be invalid and] vacated the receivership. Thompson's secured creditors thereupon threatened to proceed with the foreclosure of their mortgages, attachments and other liens and many of his unsecured creditors threatened to obtain judgments, attachments and other liens.

Found, except matter in brackets not found. A. W.

7. Thereupon and on or about August 21, 1917, the said Samuel Untermyer, acting for and on behalf of the said Creditors' Committee, informed the defendant, A. Leo Weil, of the facts substantially set forth in the foregoing [fol. 141] proposed findings numbered "3," "4," "5" and

"6." He further informed said Weil that he had concluded to institute bankruptcy proceedings against the said Thompson, but that he did not expect the bankruptcy proceedings to be protracted because he hoped and expected that the Young Option would be carried out and if carried out, it would not be necessary to have an adjudication, in any event, if carried out it would assure a composition in bankruptcy that would be satisfactory to all the creditors. The said Untermyer thereupon and on said day retained the defendants in behalf of the said Creditors' Committee, and the said defendants accepted the said retainer, to institute bankruptcy proceedings against the said Thompson, to secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings, which said Untermyer wanted instituted, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate. The said agreement and retainer was limited at the time it was made to the said specific purposes and included no other purposes or objects. It was further agreed that the defendants would perform the said services under the supervision and direction of the said Untermyer for a fee of $5,000 or any other sum that the said Untermyer might decide to be fair and reasonable, the said fee to be paid to the defendants by the said Creditors' Committee.

Refused. A. W.

8. Thereupon and pursuant to the said agreement and retainer, the defendants duly instituted proceedings in in- [fol. 142] voluntary bankruptcy against the said Thompson in the United States District Court for the Western District of Pennsylvania and at or about the same time duly obtained various injunctions and instituted various other proceedings against creditors of the said Thompson to prevent the foreclosure of mortgages, attachments and other liens and to prevent the disintegration of the said Thompson estate.

Refused. A. W.

9. The said Thompson was duly adjudicated a bankrupt on or about the 10th day of September, 1917.

Found. A. W.

10. A large amount of labor was performed by the defendants in the rendition of the services aforesaid and it was thereupon agreed between the said Untermyer and the defendants some time in the month of September, subsequent to the said adjudication in bankruptcy, but prior to the appointment of any trustees in bankruptcy as hereinafter set forth, that the defendants should not be limited to a fee of $5,000 for the said services.

Refused. A. W.

11. The agreement between the said Untermyer and the defendants referred to in the foregoing proposed finding No. "7" and the modification thereof referred to in the foregoing proposed finding No. "10" were the only agreements regarding fees made between the said Untermyer and the defendants until after the consummation of the Frick sale as hereinafter set forth.

Refused. A. W.

[fol. 143] 12. The said agreement and the modification thereof was an agreement for the retainer of the defendants on behalf of the Creditors' Committee, the defendants' actions were to be subject thereunder to the said Untermyer's directions as Counsel of said Creditors Committee, and the defendants were to receive as compensation for their services to the Creditors Committee such amount as the said Untermyer should see fit. When these agreements were made, there was no provision as to who the trustee or trustees in bankruptcy were to be, and there was no arrangement as to who was to be counsel for the trustee or trustees. It was expected that the sale of the entire property except the bank building under the Young Option would go through promptly and that the trustees and their counsel would not have much to do, except to consummate the Young (or so-called Hill) sale.

Refused. A. W.

13. At a meeting duly held of the creditors of the said Thompson, George R. Scrugham, R. M. Hite and D. M. Hartzog were [duly elected and] appointed trustees on or about the 17th day of October, 1917, and their appointment was duly confirmed, and thereupon, on or about the 18th day of October, 1917, the said three trustees duly desig-

nated, and the said District Court for the Western District of Pennsylvania duly ratified and confirmed the designation of, the defendants as general counsel for the said trustees, upon their certification in writing that they did not represent any interests which would be in any way antagonistic or adverse in the event that they were so employed, and Messrs. Umbel, Robinson, McKean & Williams, and Mr. Waitman H. Conaway as associate counsel for the [fol. 144] said trustees, upon their making a substantially similar certification. [The defendants duly accepted their said designation as general counsel to the said trustees, did not thereafter represent creditors except through said trustees, and proceeded to render services as such general counsel, and any and all services thereafter rendered by the defendants in connection with the said Thompson estate were so rendered as such general counsel to the said trustees.]

Found except matters in brackets refused. A. W.

14. At the time of the election and appointment of the said Trustees and thereafter throughout the time of the administration of the Thompson estate, there was in full force and effect in the District Court of the United States for the Western District of Pennsylvania, Rule 5 of Rules in Bankruptcy of said Court, reading as follows:

"Attorney for the Estate and his Duties. Unless specially authorized by the court, receivers and trustees in bankruptcy shall not retain as their attorney, the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

Found. A. W.

[It was to comply with this rule that the certification by the counsel appointed by the trustees referred to in the foregoing finding was made. At no time did the Court [fol. 145] authorize the trustees of the Thompson estate, either specially or otherwise, to retain the said Untermyer or the firm with which he was associated as their attorney

or counsel, and in truth and in fact, the said trustees at no time retained either the said Untermyer or the firm with which he was associated as their attorney or counsel.]

Refused. A. W.

15. Upon the designation of the defendants as general counsel to the Trustees as aforesaid, the employment of the defendants by the said Untermyer to act under his direction for the said Creditors' Committee came to an end and terminated, and said defendants did not undertake thereafter in any manner to act for said Creditors' Committee.

Refused. A. W.

16. At the time of the designation of the defendants as general counsel to the Trustees as aforesaid, there was no agreement or understanding between the said Untermyer and the defendants, express or implied, that the defendants were to be so designated as general counsel to the Trustees, nor was there at said time any agreement or understanding between them, express or implied, that the defendants, while general counsel to the Trustees, would act under the supervision or direction of the said Untermyer, nor was there at said time any agreement or understanding between them, express or implied, that the defendants would pay over to the said Untermyer any part of the fees to be allowed and paid to them as such general counsel.

Refused. A. W.

[fol. 146] 17. Immediately after the election and appointment of the said trustees and the designation by them and the approval by the said District Court of their said counsel, the said trustees and their said counsel proceeded to conclude the sale of that portion of the bank's estate involved in what is known as the Frick Sale. The said Frick Sale had been carved out of the proposed Young sale, and most of the substantial terms thereof had been negotiated prior to the appointment of the said trustees by the said Creditors' Committee and by the said Untermyer as its counsel, and the Receivers theretofore appointed by the Court of Common Pleas of Fayette County, had executed a contract therefor, [which had been accepted] prior to the removal of said Receivers.

Found as amended. A. W.

18. Upon the consummation of the said Frick Sale, it was determined to make an application for counsel fees out of the proceeds thereof, for services rendered in connection therewith. Thereupon and pursuant to agreement between the defendants, the said associate counsel and the said Untermyer, a joint petition and application for counsel fees was presented in the name of the defendants, of the said associate counsel, and of the firm with which the said Untermyer was associated, to be paid to them jointly out of the proceeds of the said Frick Sale for services rendered in connection therewith; [it was further agreed between the defendants and the said Untermyer that out of the balance remaining after payment to the said associate counsel of their proportionate parts, so much thereof would be paid to the firm with which the said Untermyer [fol. 147] was associated as the said Untermyer should designate].

Found. A. W.

Matters in brackets refused. A. W.

19. Thereafter the Court awarded to the said joint petitioners upon their said joint petition and application the sum of $40,000 out of the proceeds of the Frick Sale for their services in connection therewith and the sum of $17,000 thereof was agreed upon as the amount to be paid to the associate counsel, leaving a balance of $23,000 for distribution between the defendants and the said Untermyer or his firm. Defendants thereupon repeatedly requested the said Untermyer to fix and designate the proportion of the said sum of $23,000 that he desired to be paid to the firm with which he was associated, but the said Untermyer did not do so and has not done so. On the other hand, defendants have not demanded from the said Untermyer or from said Creditors' Committee compensation for the services rendered as aforesaid by the defendants prior to their designation as general counsel to the Trustees, and the defendants have received no compensation for their said services.

Refused. A. W.

20. The expected sale of the bulk of the Thompson properties under the Young Option was never consummated [and was abandoned], and the expected composition in bankruptcy did not take place.

Found, except matter in brackets. A. W.

21. In or about the month of May, 1918, a serious personal disagreement occurred between the said Untermyer [fol. 148] and the defendant Weil, arising out of the matter not connected with the Thompson estate, of such a nature as to make further personal relations between them impracticable and impossible, and it was thereupon agreed between the said Untermyer and the defendant Weil that they and their respective firms should have no further professional relationship of any kind with each other.

Refused. A. W.

22. The administration in bankruptcy of the Thompson Estate continued in regular course, and further sales of small portions of the estate known as the Rockwell and Dorsey Sales were negotiated and made by the trustees, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was made by the trustees to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' Committee and by the said Untermyer, whereby it was provided that the purchasers, in addition to paying to the trustees the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and of the said Untermyer as its counsel prior to the bankruptcy and for such assistance as the Creditors' Committee and its said counsel had rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000. The said contract of purchase and sale was duly ratified and approved by the said District Court, and the purchasers did thereupon pay to the said Creditors' Committee, pursuant thereto, the greater part of the said [fol. 149] sum of $360,000 and will pay the balance thereof upon the fulfillment of certain conditions in said contract or purchase and sale specified.

Refused. A. W.

23. At no time did the defendants or either of them make any agreement with the said Untermyer for the payment to the said Untermyer or to his firm of any part of the fees allowed or to be allowed to the defendants as general

counsel to the trustees, except as hereinbefore stated with respect to the fees allowed for joint services in connection with the Frick Sale.

Refused. A. W.

24. After the election and appointment of the trustees as hereinbefore stated, the said Creditors' Committee continued to act and to function, and the said Untermyer continued to act as counsel to the said Creditors' Committee, and the professional services rendered by said Untermyer and the firm of Guggenheimer, Untermyer and Marshall with which he was connected, and his and their associates, were rendered for and on account of said Creditors' Committee and for and on account of the claims upon the bankrupt estate which had been assigned by creditors to said Creditors' Committee, and not as counsel or attorneys for said Trustees.

Refused. A. W.

25. Any services rendered by the said Untermyer or Guggenheimer, Untermyer and Marshall, the firm with which he was associated, after the appointment of the [fol. 150] trustees were so rendered by him and them as counsel and attorneys of the Creditors' Committee, and the said Untermyer agreed to accept as compensation for the said services rendered after the appointment of the trustees and for such services as he and they rendered prior to the bankruptcy, such sum as he and the Creditors' Committee might agree upon out of the sum of $360,000 stipulated in the said Piedmont Coal Company contract.

Refused. A. W.

26. The claims of the creditors who had deposited their claims with and assigned same to the Creditors' Committee were filed with the Trustees by the Creditors' Committee through the said Untermyer as its counsel. Many of the said claims were objected to and contested by the trustees and their counsel, whereupon the said Creditors' Committee, through the said Untermyer, nevertheless insisted upon retaining possession of and title to the said claims and of defending the regularity of the deposit and assignment thereof to the Creditors' Committee and of the regularity of the filing of proofs of the said claims by the Creditors' Committee with the trustees, but left the prose-

cution of the said claims on the merits otherwise to personal counsel selected by such creditors; a number of said claims so contested were rejected in whole or in part.

Refused. A. W.

27. Other creditors who had deposited their claims with and assigned them to the Creditors' Committee sought to withdraw the same from the Creditors' Committee and to [fol. 151] make independent proof in their own names of their said claims before the trustees, but the Creditors' Committee through the said Untermyer opposed such action on the part of said creditors.

Refused. A. W.

28. Up to on or about October 27, 1920, there was allowed and paid to the defendants for their services as general counsel to the trustees the sum of $142,659.98. Thereupon the said Untermyer demanded of the defendants that they pay over to him 40% of the said sum.

Found. A. W.

When the said demand was first made it was placed upon the ground that the said Untermyer was entitled thereto because he had brought the defendants into the Thompson matter and had introduced the said business to the defendants and was entitled thereto because of the relationship of the parties as corresponding attorneys. Thereafter the said Untermyer demanded 40% of the said sum on the ground of an alleged agreement between him and the defendant Weil, whereby the defendants had agreed that, while general counsel to the trustees, they would act under the orders and directions of the said Untermyer, and had further agreed to pay over to the said Untermyer such proportion as he should fix and designate out of any allowances to be made and paid to the defendants as general counsel to the trustees. The defendants denied that any such agreement, express or implied, had ever been made and refused to pay over to the said Untermyer any sum whatsoever on the basis of any such alleged agreement, and [fol. 152] further contended that such an agreement, if made, would have been unprofessional, contrary to public policy, a fraud upon the Court, and null and void.

Refused. A. W.

29. The said Untermyer [thereupon] assigned his alleged claims against the defendants to the plaintiff herein, but there was no assignment to the plaintiff from the firm with which the said Untermyer was associated, to wit, the firm of Guggenheimer, Untermyer & Marshall.

Found except word thereupon. A. W.

30. The plaintiff herein [thereupon] instituted this action as assignee of the said Untermyer under a summons and complaint in which the said Untermyer's alleged claim was specifically placed upon the ground of the said alleged agreement.

Found except word thereupon. A. W.

31. The firm of Weil & Thorp was dissolved on the 1st day of December, 1920. The defendant Weil thereafter continued to render services as general counsel to the trustees in the general course of the administration of the bankrupt estate and for the said services, [which did not include services in connection with any sales of the property of the bankrupt estate and had no reference to preventing disintegration of the estate,] there was allowed and paid to the defendant Weil the sum of $21,000 on or about November 30, 1921, and the further sum of $23,333.31 on or about May 10, 1924. During the trial of this action before the Referee herein, the said Untermyer and plaintiff as his assignee made claim to a portion of the said allowances [fol. 153] and it was thereupon stipulated that the Referee might hear and determine the said claim with the same force and effect as if it had been included in the original complaint herein, and upon motion of plaintiff an amended complaint was thereupon served and filed herein under which the plaintiff set forth his claim to a share of the said additional allowances.

Found except matter in brackets. A. W.

32. There is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

Refused. A. W.

Conclusion of Law

1. There was no agreement made by the defendants with Samuel Untermyer or with the firm with which said Unter-

myer was associated for the division of any allowances made for services rendered to the trustees in bankruptcy, saving and excepting the agreement between the defendants and the firm with which the said Untermyer was associated, to wit, the firm of Guggenheimer, Untermyer & Marshall, for the division of fees allowed for services in connection with the Frick Sale.

Refused. A. W.

2. The alleged agreement set forth in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Untermyer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defend-
[fol. 154] ants as general counsel to the trustees was unprofessional, contrary to public policy, illegal, and null and void.

Refused. A. W.

3. The validity of such an agreement as that alleged and set forth in the complaint and in the amended complaint herein filed, and testified to by Mr. Untermyer to have been made between the said Untermyer and the defendants, regarding the division between the said Untermyer and the defendants of the fees to be allowed to the defendants as general counsel for the trustees, is to be determined not by what said parties did thereunder, but by the general tendency of such an agreement. If that is opposed to the interests of the public, the agreement is void, even though in that particular case the intent of the parties may have been good and no injury to the public may have resulted. It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the general tendency of such contracts, and it closes the door to temptation by refusing them recognition in any of the courts of the country. It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results.

Refused. A. W.

4. When such a contract or agreement as that alleged in the complaint or the amended complaint filed in this case, or in the testimony of the plaintiff, is brought to the atten-

tion of the Court, it is the duty of the Court to refuse to [fol. 155] enforce such contracts or agreements, for the protection of the administration of justice, regardless of how it may affect the interests of either party to said attempt to enforce said agreement, whether plaintiff or defendant.

Refused. A. W.

5. The alleged agreement set for in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Untermyer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defendants as general counsel to the trustees was vague, indefinite and unenforceable.

Refused. A. W.

5a. There is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

Refused. A. W.

6. The complaint should be dismissed upon the merits and judgment should be entered accordingly.

Refused. A. W.

Dated New York, December 12, 1925.

——— ———, Referee.

[fol. 156] In United States District Court

[Title omitted]

Plaintiff's Proposed Findings of Fact and Conclusions of Law

The plaintiff, Edward M. Neary, by Guggenheimer, Untermyer & Marshall, his attorneys, respectfully submits the following proposed findings of fact and conclusions of law.

Findings of Fact

1. At all the times hereinafter mentioned the defendants, A. Leo Weil and Charles M. Thorp, were copartners engaged in the practice of law in the City of Pittsburgh, State

of Pennsylvania, under the firm name and style of Weil & Thorp.

Found. A. W.

2. At all the times hereinafter mentioned the plaintiff's assignor, Samuel Untermyer, was engaged in the practice of law in the City of New York, State of New York.

Found. A. W.

[fol. 157] 3. Prior to the commencement of this action, Samuel Untermyer duly assigned and transferred to the plaintiff all of his right, title and interesst in the cause of action set forth in the complaint and amended complaint herein and the plaintiff is the owner thereof.

Found. A. W.

4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors.

Found. A. W.

5. In or about January, 1915 such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said estate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and such assets were conserved principally through the [fol. 158] instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00.

Found. A. W.

6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclose of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to institute such bankruptcy proceedings. To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the protection of the creditors and the conservation of the estate of said Thompson and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars.

Found.—A. W.

7. Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connec-
[fol. 159] tion with said Thompson his Estate or his creditors.

Found. A. W.

8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of the three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, the defendants herein acting at the instance of plaintiff's assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson.

Found. A. W.

9. The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendants' connection with plaintiff's assignor in relation to such creditors.

Found. A. W.

10. In the course of the administration of the Estate of the said Thompson, various complications arose which pro- [fol. 160] longed the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy.

Found. A. W.

11. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together perform such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.

Found. A. W.

[fol. 161] 12. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances were made in such bankruptcy proceedings by the District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, to an aggregate amount received by them for such services of $142,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him.

Found. A. W.

13. On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement, [and after giving due consideration to the nature and character of the services rendered by the defendants and by himself and by the firm of Guggenheimer, Untermyer & Marshall, acting for him, in the aforesaid bankruptcy proceedings,] determined [in good faith that a fair and reasonable] the division of the sum of $142,659.98 theretofore received by the defendants as aforesaid, was that the defendants should re-[fol. 162] tain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision, [which were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid.]

Found omitting portions in brackets which are not found. A. W.

14. Thereafter the defendants, [although for a long time admitting and recognizing the right of plaintiff's assignor in the premises, and after seeking to induce him to make a larger allowance to them,] refused to comply with his de-

termination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,064.00 with interest from November 15, 1920.

Found except portions in brackets which is not found. A. W.

15. On or about November 30, 1920, the firm of Weil & Thorp having been dissolved, the defendant Weil succeeded said firm in the aforesaid bankruptcy proceedings and on or about November 30th, 1921, a further allowance in said proceedings was made to him in the sum of $21,000 and on or about May 10, 1924, a further and additional allowance was made to him to the extent of $23,333.31 and further and additional allowances will be sought by him on the winding up of the said estate in bankruptcy. A. W.

[fol. 163] 16. During the pendency of the trial hereof, plaintiff's assignor for the first time learned of the payment to the defendant Weil of the allowances referred to in the foregoing finding, and the complaint was amended so as to include a claim by plaintiff for forty percentum (40%) of such amounts. The plaintiff, however, failed to prove that his assignor had made any determination as to the division of the amounts received by the defendant Weil subsequent to October 27th, 1920, between himself and the said Weil. Consequently, there can be no recovery as to said sum in this action.

Found. I also find that the contract between Untermyer and the defendants was limited to the preservation of the Estate and come to an end with the Piedmont sale. A. W.

17. By a stipulation entered on the minutes herein it was agreed that any judgment to be entered herein in favor of the plaintiff shall run as against both defendants as to all sums received by them to December 1st, 1920, on account of the allowances made in the bankruptcy proceedings and that as to all allowances made therein to the defendants or either of them subsequent to December 1st, 1920, any judgment to be entered herein on behalf of the plaintiff shall run against the defendant, A. Leo Weil, only.

Found. A. W.

18. On December 4, 1923, it was stipulated and agreed in writing on behalf of the parties hereto that the trial of this case should be referred to Allen Wardwell, Esq., as ref- [fol. 164] eree, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court, that the fees of the referee and of the stenographer should be included and taxed in this action, and that an order might be entered thereon by either party without further notice, and thereafter and on December 10, 1923, pursuant to said stipulation an order was duly made at a term of the United States District Court for the Southern District of New York, in conformity with such stipulation.

Found. A. W.

Conclusions of Law

1. The defendants, A. Leo Weil and Charles M. Thorp, are jointly and severally indebted to the plaintiff for 40% of the sum of $142,659.98, being the total allowances received by the defendants on or prior to October 27, 1920, in the proceedings in which Josiah V. Thompson was adjudicated a bankrupt, to wit, the sum of $57,064.00 with interest thereon from November 15, 1920.

Found. A. W.

2. Judgment is directed in favor of the plaintiff against the defendants for $57,064.00, with interest from November 15, 1920, together with the costs of this action, including the Referee's fees and stenographer's minutes.

Respectfully submitted,

Guggenheimer, Untermyer & Marshall, Attorneys for Plaintiff. Office & P. O. Address: 120 Broadway, Borough of Manhattan, New York City.

[fol. 165] In United States District Court

[Title omitted]

Report of Referee

The action having come on before me as Referee and the issues having been tried, and having heard counsel for the

respective parties, after due deliberation I hereby find, report and decide as follows:

Findings of Fact

1. At all the times hereinafter mentioned the defendants, A. Leo Weil and Charles M. Thorp, were co-partners engaged in the practice of law in the City of Pittsburgh, State of Pennsylvania, under the firm name and style of Weil & Thorp.

2. At all the times hereinafter mentioned the plaintiff's assignor, Samuel Untermyer, was engaged in the practice of law in the City of New York, State of New York.

3. Prior to the commencement of this action, Samuel Untermyer duly assigned and transferred to the plaintiff all of his right, title and interest in the cause of action set forth [fol. 166] in the complaint and amended complaint herein and the plaintiff is the owner thereof.

4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors.

5. On or about January, 1915, such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said estate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and such assets were conserved principally through the

instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00.

6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania [fol. 167] on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclosure of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to institute such bankruptcy proceedings. To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the protection of the creditors and the conservation of the estate of said Thompson and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars.

7. Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connection with said Thompson, his Estate or his creditors.

8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, [fol. 168] the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, the defendants herein acting at the instance of plaintiffs' assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson.

9. The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendant's connection with plaintiff's assignor in relation to such creditors.

10. In the course of the administration of the Estate of the said Thompson, various complications arose which prolonged the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy.

11. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together per-[fol. 169] form such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) Dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiffs' assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.

12. The said agreement referred to in Finding 11 applied only to fees for services rendered in connection with the preservation of the bankrupt's estate against forced

sales by mortgages, judgment creditors and other lienors and the sale of the properties of the estate and did not apply to fees for services rendered in connection with the general administration of the estate after all of the properties embraced in the estate had been sold or otherwise disposed of.

13. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor, and of Guggenheimer, Untermyer & Marshall, who acted [fol. 170] for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances were made in such bankruptcy proceedings by the District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, to an aggregate amount received by them for such services of $142,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him.

14. On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28th, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement determined the division of the sum of $142,659.98, theretofore received by the defendants as aforesaid, was that the defendant should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision.

15. Thereafter the defendants refused to comply with his determination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,063.99 with interest from November 15, 1920.

16. On or about November 30, 1920, the firm of Weil & Thorp having been dissolved, the defendant Weil suc-
[fol. 171] ceeded said firm in the aforesaid bankruptcy proceedings and on or about November 30th, 1921, a further allowance in said proceedings was made to him in the sum of $21,000 and on or about May 10, 1924, a further and additional allowance was made to him to the extent of $23,333.31 and further and additional allowances will be sought by him on the winding up of the said estate in bankruptcy. It does not appear that any of the services rendered by the said Weil after November 30, 1920, and for which the allowances of $21,000 and $23,333.31 were made were rendered in connection with the preservation of the estate against forced sales and the sale of the properties of the estate.

17. During the pendency of the trial hereof, plaintiff's assignor for the first time learned of the payment to the defendant Weil of the allowances referred to in the foregoing finding, and the complaint was amended so as to include a claim by plaintiff for forty per centum (40%) of such amounts. The plaintiff, however, failed to prove that his assignor had made any determination as to the division of the amounts received by the defendant Weil subsequent to October 27th, 1920, between himself and the said Weil.

18. By a stipulation entered on the minutes herein it was agreed that any judgment to be entered herein in favor of the plaintiff shall run as against both defendants as to all sums received by them to December 1st, 1920, on account of the allowances made in the bankruptcy proceedings and that as to all allowances made therein to the defendants or either of them subsequent to December 1st, 1920, any judg-
[fol. 172] ment to be entered herein on behalf of the plaintiff shall run against the defendant, A. Leo Weil, only.

19. On December 4, 1923, it was stipulated and agreed in writing on behalf of the parties hereto that the trial of this case should be referred to Allen Wardwell, Esq., as referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court, that the fees of the referee and of the stenographer should be included and taxed in this action, and that an

order might be entered thereon by either party without further notice, and thereafter and on December 10, 1923, pursuant to said stipulation an order was duly made at a term of the United States District Court for the Southern District of New York, in conformity with such stipulation.

Conclusions of Law

1. The defendants, A. Leo Weil and Charles M. Thorp, are jointly and severally indebted to the plaintiff for 40% of the sum of $142,659.98, being the total allowances received by the defendants on or prior to October 27, 1920, in the proceedings in which Josiah V. Thompson was adjudicated a bankrupt, to wit, the sum of $57,064.00 with interest thereon from November 15, 1920.

2. Judgment is directed in favor of the plaintiff against the defendants for $57,064.00 with interest from November 15, 1920, together with the costs of this action, including the Referee's fees and stenographer's minutes.

Dated New York, January 13th, 1926.

Allen Wardwell, Referee.

[fol. 173] In United States District Court

[Title omitted]

Defendants' Exceptions

The defendants, A. Leo Weil and Charles M. Thorp, by Stein & Salant, their attorneys, Carter, Ledyard & Milburn, of Counsel, take the following exceptions to the Proposed Report and Opinion of the Referee, to whom this case has been referred by an order heretofore made herein, which Report, undated, was delivered to the attorneys for the parties herein on the 6th day of November, 1925, to wit:

1. For that the said Referee erroneously found and stated in the said Proposed Report that a contract substantially as alleged by the plaintiff did exist; whereas he should have found from the pleadings and the evidence, as he in fact states in his Proposed Report, that no contract such

as that alleged in the complaint or in the amended complaint did in fact exist; and he should further have found from the evidence that no such contract as claimed by plaintiff was ever made or did in fact exist.

[fol. 174] 2. For the said Referee erroneously found and stated in the said Proposed Report that "this arrangement" (meaning thereby the arrangement made between Samuel Untermyer and the defendants in August and September, 1917), "could properly be applied to fees subsequently allowed to the trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees"; whereas he should have found from the pleadings and the evidence that the said arrangement was by its terms and by its purpose and intent limited to the fees to be paid to the defendants by the Creditors Committee for services rendered by the defendants as attorneys and counsel for the Creditors Committee up to the time that the defendants were appointed as general counsel to the trustees; and whereas he should have found from the pleadings and the evidence and from the terms and nature of said arrangement, that the said arrangement did not include or refer to any fees to the defendants as general counsel to the trustees that might be paid or allowed by the trustees and the court.

3. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's subsequent correspondence with Mr. Marshall constitutes an admission of the receipt by him of Mr. Wickwire's letter of April 26, 1918, Plaintiff's Exhibit 133; whereas he should have found from the evidence that the said letter of Mr. Wickwire, dated April 26, 1918, Plaintiff's Exhibit 133, was not received by the defendant.

4. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's let-[fol. 175] ter to Mr. Untermyer, dated May 7, 1918, Plaintiff's Exhibit 144, cannot be limited to the construction that the said letter referred only to the Frick fees; whereas he should have found from the said letter and from the evidence that the said letter did in truth and fact refer to the Frick fees only, the only fees then under discussion.

5. For that the said Referee erroneously found and stated in the said Proposed Report that the language of the said letter dated May 7, 1918, Plaintiff's Exhibit 144, is far broader than the fixing of the allowances in connection with the Frick sale and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees; whereas he should have found from the said letter and from the evidence that the language of the said letter was limited to the fixing of the allowances in connection with the Frick sale and refers to an arrangement between the parties with regard to the allowances in connection with the Frick sale and to those allowances only, even though the language, unexplained by the conditions under which it was written, might be given a broader construction.

6. For that the said Referee erroneously found and stated in the said Proposed Report that at the time of the writing of the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, no special arrangement had yet been made as to the fixing of the Frick fees; whereas he should have found from the evidence that a special arrangement had then and theretofore been made as to the fixing of the Frick fees, to wit, that after there had been paid and distributed to the associate counsel to the trustees their respective proportions of the [fol. 176] joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to be divided between the said Untermyer's firm and the defendants in such proportion as the said Samuel Untermyer would designate.

7. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement referred to by the defendant Weil in the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, could only be the agreement made prior to the appointment of the Trustees, which Mr. Weil now interprets to refer to compensation allowed by the Trustees; whereas he should have found from the evidence that the agreement referred to in the said letter, by reason of the difference in terms and parties and services to be rendered, could not refer to the services to be rendered by defendants to the trustees but referred to the special arrangement made after the Frick sale had been consummated by the Trustees, whereby, after there had been paid

and distributed to the associated counsel to the Trustees their respective proportions of the joint allowance made or to be made by the Court for services in connection with the Frick sale, the balance should be paid to the defendants to be divided between the said Untermyer's firm and the defendants in such proportion as the said Untermyer would designate.

8. For that the said Referee erroneously found and stated in the said Proposed Report that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest, and Mr. Untermyer's interest [fol. 177] in the fees allowed to counsel to the Trustees, disposes of the contention made by Mr. Weil in respect to the compensation to the counsel of the Creditors Committee allowed upon the consummation of the Piedmont sale; whereas he should have found that the defendant Weil's recognition of the distinction between the compensation allowed to Mr. Untermyer directly in which he (the said Weil) has no interest and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, referred solely to the distinction between, on the one hand, the compensation to be allowed to the said Untermyer directly upon his separate application (which was made) for fees and compensation for services rendered by the said Untermyer for the preservation of the estate prior to the bankruptcy, and on the other hand, Mr. Untermyer's interest in the fees to be allowed to the counsel of the trustees jointly, including the said Untermyer's firm, upon their joint application for fees for services in connection with the Frick sale; and whereas he should have found from the evidence that the compensation to counsel of the Creditors Committee allowed upon the consummation of the Piedmont sale under the Piedmont contract, in express terms included and covered any and all compensation to the said Untermyer for any services rendered and assistance given by him to the Trustees after the appointment of the Trustees.

9. For that the said Referee erroneously found and stated in the said Proposed Report that the relations between the said Untermyer and his firm on the one hand and the defendants on the other hand were not broken off so far as the Thompson case was concerned by the correspondence

which took place between the said Untermyer and the de-
[fol. 178] fendant Weil in May, 1918; whereas he should have found from the evidence and from the said correspondence that it was then mutually agreed between the said Untermyer and the said Weil that they and their respective firms should have no further relations with each other as associate counsel in the Thompson case or any other matter, their subsequent relations being not as associates, but the said Weil representing the trustees and the estate and said Untermyer and his firm representing the Creditors Committee.

10. For that the said Referee erroneously found and stated in the said Proposed Report that the agreement made between the said Untermyer and the said Weil by their mutual correspondence in May, 1918, that they and their respective firms should have no further relations did not apply to the Thompson case, or if it did, it was not carried into effect, because the correspondence between Mr. Weil and Mr. Untermyers's assistants in connection with the Thompson estate continued thereafter to be practically as active as before; whereas he should have found from the evidence that the said agreement between the said Untermyer and the defendant Weil was carried into effect and applied to the Thompson case, and that whatever subsequent correspondence there was between the defendant Weil and the said Untermyer's assistants in connection with the Thompson estate theraafter was only such correspondence as the defendant Weil, acting as counsel to the Trustees, had with the assistants of said Untermyer acting as counsel to the Creditors Committee.

[fol. 179] 11. For that the said Referee erroneously found and stated in the said Proposed Report that the parties by their correspondence just cited (meaning the correspondence which took place in April and May, 1918) mutually agreed and understood that the original agreement was meant to and did apply to fees to be received by defendants as counsel for the Trustees; whereas he should have found from the evidence that the parties by their said correspondence did not agree or understand that the original agreement was meant to apply or did apply to fees to be received by defendants as counsel for the trustees; and whereas he should have found from the evidence that the

parties by their said correspondence were discussing and referring to the division of fees to be allowed upon the joint petition and application of themselves and the associate counsel to the Trustees in connecton with the Frick sale and to these fees only.

12. For that the said Referee erroneously found and stated in the said Proposed Report that there was an agreement between the plaintiff (meaning the said Untermyer) and the defendant with respect to the distribution of the fees received by defendants as counsel to the Trustees in the Thompson Estate and that such agreement was that the amount of such fees, when received, should be divided in such manner as Mr. Untermyer should determine, and that this agreement covered the period from the beginning of the bankruptcy proceedings until the time when the properties were sold, and applied to all fees received by the defendants from the trustees during that period; whereas he should have found from the pleadings and the evidence that the only agreement between the said Untermyer and the [fol. 180] defendants with respect to the distribution of any fees received by the defendants as counsel to the Trustees was the agreement heretofore referred to with reference to the Frick fees and those fees only.

13. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement claimed by the plaintiff was predicated upon the services rendered and to be rendered in connection with the preservation of the estate against foreclosures of secured liens and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors; whereas he should have found from the pleadings and the evidence that the alleged agreement as claimed by the plaintiff was also predicated upon services rendered and to be rendered by the defendants in connection with securing the appointment of a Trustee named by the said Untermyer, also in connection with obtaining the appointment of counsel to the Trustees who would as such counsel act under the orders and directions of the said Untermyer, and who would so act under said Untermyer in connection with all matters pertaining to the Thompson estate, and that it was part and parcel of the said agreement alleged by said Untermyer that all such services to be rendered by the said counsel

would be under the orders and directions of the said Untermyer.

14. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing necessarily illegal or contrary to public policy in the arrangement as claimed by the said Untermyer and as con- [fol. 181] strued by the said Referee; whereas he should have found from the pleadings and the evidence that under the arrangement as claimed by the said Untermyer and as found by the Referee, the defendants, though appointed by the trustees and confirmed by the court, and under the circumstances peculiarly the officers of the court in a most confidential relationship, were nevertheless to subject themselves in the performance of their duties as counsel to the Trustees, to the orders and directions of the said Untermyer instead of to the orders and directions of the Trustees and of the Court, and he should therefore further have found that the said alleged arrangement, by reason of the fraud and because of its temptations and tendencies, was illegal, unprofessional, contrary to public policy, null and void.

15. For that the said Referee erroneously found and stated in the said Proposed Report that there was no conspiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a trustee to be elected; whereas he should have found from the evidence that under the alleged arrangement as claimed by the said Untermyer it was part and parcel of the alleged arrangement that George R. Scrugham should be appointed sole Trustee, that claims should be collected for that purpose, and that the defendants should be appointed counsel to the Trustees to be elected, and that the defendants agreed that, upon their appointments as such counsel, they would act under the directions and orders of the said Untermyer; and he should therefore further have found that the said alleged [fol. 182] arrangement was illegal, unprofessional, contrary to public policy, null and void.

16. For that the said Referee erroneously found and stated in the said Proposed Report that the interests which the said Untermyer represented were not adverse to the

general creditors; whereas he should have found that the interests of creditors whom the said Untermyer represented were in some respects adverse to the interests of the other general creditors and adverse to the interests of the Trustees, in that the Creditors' Committee which the said Untermyer represented were the owners of certain claims which it was to the interest of the Trustees and of the other general creditors who had not assigned their claims to the Creditors Committee, to oppose and defeat and which claims the Trustees through the defendants and their other counsel, did oppose and defeat.

17. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees seem to have gone out of their way to select counsel who already represented a large number of creditors and that the defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors' Committee; whereas he should have found from the evidence that all representation by the said counsel for creditors and any representation by the defendants in behalf of the said Untermyer and with respect to those creditors who had deposited their claims with the Creditors' Committee ceased and came to an end upon their appointment as counsel for the Trustees.

[fol. 183] 18. For that the said Referee erroneously found and stated in the said Proposed Report that Mr. Weil did not at the time he was appointed counsel to the Trustees disclaim that he was acting on behalf of the Creditors' Committee; whereas he should have found from the evidence that Mr. Weil and the defendants did specifically at the time state in writing to, and file with, the Referee and to and with the Court, a statement to the effect that upon their appointment as general counsel to the Trustees they ceased to represent and no longer represented the Creditors' Committee.

19. For that the said Referee erroneously found and stated in the said Proposed Report that Mr. Weil wrote to Mr. Untermyer that he considered himself to have been appointed as Mr. Untermyer's representative and testified that he considered that he continued to represent those interests until the Young-Hill deal fell through; whereas he

should have found from the evidence that what Mr. Weil wrote and meant by the term "representative" was that he was representing, in accord with Mr. Untermyer and the Creditors' Committee, the same general purpose to put through the Frick and Young-Hill deals, believing them to be desirable and for the best interests of all the creditors and that he was therefore favorable to the carrying out of those deals.

20. For that the said Referee erroneously found and stated in the said Proposed Report that the Trustees appear to have forestalled any complication on this ground (meaning the ground that the defendants were counsel to the Creditors' Committee) by joining with the counsel for [fol. 184] the Creditors' Committee two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors' Committee; whereas he should have found from the evidence that when the defendants were appointed as counsel to the Trustees, they ceased to represent the Creditors' Committee, and he should further have found that the appointment of the two other counsel to the Trustees had nothing whatever to do with the fact that the defendants had previously been counsel to the Creditors' Committee.

21. For that the said Referee erroneously found and stated in the said Proposed Report that there was no reason to presume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between the Creditors' Committee and the creditors who had not deposited their claims with the Creditors' Committee; whereas he should have found from the evidence that there was at all times the possibility and the probability, well known to all of the parties, that some of the claims represented by the Creditors' Committee would be opposed by the Trustees and by the other creditors, and that they were in fact so opposed by the Trustees and by the other creditors and were defeated; and whereas he should further have found from the evidence that under the alleged arrangement as claimed by the said Untermyer and as found by the Referee the defendants would have been bound upon any issue as to such claims deposited with the Creditors' Committee, to act under the directions and

orders of the said Untermyer, and as counsel to the Trustees could have been ordered by said Untermyer not to oppose said claims, and that the said alleged arrangement was [fol. 185] therefore illegal, unprofessional, contrary to public policy, null and void.

22. For that the said Referee erroneously found and stated in the said Proposed Report that the defendants were on the ground and it was their duty to call the attention of the Court to the arrangement (meaning the arrangement as claimed by the plaintiff) which they had had with the plaintiff (meaning the said Untermyer) if that was necessary; whereas he should have found from the evidence, and did in fact so find, that the time when the defendants were appointed general counsel to the Trustees there was no such arrangement in existence as that claimed by the plaintiff (the said Referee having assumed the making of said arrangement by the subsequent correspondence), and there was consequently nothing to which the Court's attention could be called; and whereas he should further have found from the evidence and from the law that if such an agreement or arrangement was made as that claimed by the plaintiff, it was illegal, unprofessional, contrary to public policy, null and void, and that the failure to call it to the attention of the Court did not cure its illegal, unprofessional and void character; Justice, for its own protection, and not for the benefit of the parties, striking down all such contracts when the same are brought to its notice.

23. For that the said Referee erroneously found and stated in the said Proposed Report that if the agreement which the plaintiff made applied, as the Referee believes it did, to fees other than the fees in the Frick sale, it was the defendants' duty to do whatever was necessary to bring [fol. 186] that matter to the attention of the Court; whereas he should have found from the evidence and from the law that if the said alleged agreement applied to fees other than the fees in the Frick sale, it was the duty of the said Untermyer who was to have benefited thereby to do whatever was necessary to validate the contract and therefore to bring that matter to the attention of the Court; and whereas he should further have found from the evidence and from the law and for the protection of the administration of justice,

that no alleged failure of anybody at the time to bring that matter to the attention of the Court could in any wise affect the illegal and unenforceable nature of that alleged agreement.

24. For that the said Referee erroneously found and stated in the said Proposed Report that if the defendant understood, as the Referee believes he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees, he could and should have insisted that the subsequent applications to which that agreement applied should have been made upon the plaintiff's (meaning the said Untermyer's) behalf as well as on behalf of the other counsel; whereas he should have found from the evidence and from the law that if the said Untermyer made an arrangement with the defendants applying to subsequent fees, it was the business and the duty of the said Untermyer to see to it, and he could and should have insisted, that the subsequent applications to which the alleged agreement applied should be made upon the said Untermyer's behalf as well as on behalf of the other counsel, and that this was not the duty and obligation of the defendants.

[fol. 187] 25. For that the said Referee erroneously found and stated in the said Proposed Report that there was nothing in the original arrangement which was not susceptible of being legally carried out, and if it was the defendants' fault that any appropriate steps were not taken to inform the Court of those facts, he cannot now be heard to plead that failure in his own behalf, whereas he should have found from the evidence and from the law that the original arrangement as claimed by the plaintiff, regardless of whether or not it was susceptible of being legally carried out, if in its general tendency it was bad and if it opened the door to temptation, then the law refuses it recognition, and therefore the alleged arrangement was wholly illegal, unprofessional, contrary to public policy and null and void, and he should further have found from the evidence and from the law that the failure to inform the Court by either or both parties did not and could not cure the illegal, unprofessional and void character of said alleged arrangement, which the court would strike down for the protection of the admin-

istration of justice, whenever it found out the character of the arrangement.

26. For that the said Referee erroneously found and stated in the said Proposed Report that Weil and Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with the Thompson Estate, which cannot be considered as rendered on behalf of the Creditors Committee as distinguished from the creditors as a whole; whereas he should have found from the evidence that Weil and Thorp availed themselves to a large extent of the plaintiff's (meaning the said Untermyer's) assistance and services only in connection with the [fol. 188] Frick sale, and that any other assistance and services rendered by the said Untermyer after the appointment of the Trustees were so rendered by him as counsel to the Creditors Committee and were fully compensated for by the provision for compensation to the Creditors Committee and its counsel in the Piedmont Coal Company contract.

27. For that the said Referee erroneously found and stated in the said Proposed Report that the interests of the Creditors Committee were not adverse to those of the general creditors and that the Creditors Committee did not take a position adverse to the general creditors; whereas he should have found from the evidence that the Creditors Committee continued to remain as owner of certain claims deposited with and assigned to it, which the Trustees and their counsel and the other creditors contested and defeated, and that as to such claims, the interests of the Creditors Committee were adverse to the interests of the Trustees and the other creditors.

28. For that the said Referee erroneously found and stated in the said Proposed Report that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the creditors, whether represented by the Committee or not, nor was there any reason to suppose that any such condition would arise, nor in fact did any such condition arise; whereas he should have found from the evidence and from the law that at the time when the alleged agreement as claimed by the

plaintiff was made, and at all subsequent times, there was [fol. 189] a potential diversity of interest between the Creditors Committee on the one hand and the Trustees and the other creditors on the other hand, which potentiality materialized as to certain creditors represented by said Untermyer; and whereas he should further have found from the evidence and from the law that it is the tendency of the said alleged agreement, and not necessarily some illegal act thereunder, that makes it illegal, unprofessional, contrary to public policy, null and void.

29. For that the said Referee erroneously found and stated in the said Proposed Report that the potential diversity of interest, arising from the fact that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors Committee, would apply to Mr. Weil himself, who did not cease to represent the Creditors Committee upon his appointment as counsel to the Trustees; whereas he should have found from the evidence that the potential diversity of interest in no wise applied to Mr. Weil, and that Mr. Weil's retainer and employment by the Creditors Committee terminated and came to an end upon his appointment as counsel to the Trustees.

30. For that the said Referee erroneously found and stated in the said Proposed Report that the only objection that he can see to the alleged contract as claimed by the plaintiff and as found by the Referee was that it does not seem in terms to have been made known to the Court or to the Referee in Bankruptcy; whereas he should have found from the evidence and from the law that the vital objections to the said alleged contract were and are (1) that it was [fol. 190] part and parcel of the alleged contract as claimed by plaintiff that defendants should bring about the selection of the said Untermyer's nominee as sole trustee, (2) that it was also part and parcel of the said alleged contract that defendants should then be appointed as general counsel to the trustee so selected under an agreement to turn over to the said Untermyer so much of the fees allowed them as such counsel as the said Untermyer would designate, (3) that under it the defendants, while acting as general counsel to the Trustee, agreed to subject themselves to the orders and directions of the said Untermyer, (4) that the defendants

would thereby have interests to advance in conflict with their obligations as counsel to the Trustees in that it would be to their interest to be subservient to the wishes, orders and directions of the said Untermyer since the said Untermyer was to determine the amount of their compensation, (5) that the said Untermyer would thereby have a selfish interest to advance in conflict with his duty to the Creditors Committee in that it would be to his interest not to object to or oppose any applications that defendants might make for fees and allowances as general counsel to the Trustees, regardless of the amount and fairness of the fees and allowances applied for, (6) that the general tendency of any such agreement makes it illegal, unprofessional, contrary to public policy, null and void, because it is opposed to the interests of the public, opens the door to temptation, and makes it easy to contaminate the sources of justice.

31. For that the said Referee erroneously found and stated in the said Proposed Report that there is no reason to suppose that had the plaintiff or the defendant called the [fol. 191] the attention of the Court to the alleged arrangement as claimed by the plaintiff and as found by the Referee there would have been any objection to the plaintiff sharing in these fees; whereas he should have found from the evidence and from the law that if the attention of the Court had been called to the alleged arrangement as claimed by the plaintiff, the said arrangement would have been declared to be illegal, unprofessional, contrary to public policy, null and void, and he should have found further, as testified to by one of the trustees, that the witness would not have agreed to the appointment of said general counsel had he known of any such arrangement as that now claimed by Mr. Untermyer to have been made.

32. For that the said Referee erroneously found and stated in the said Proposed Report that certainly the Court's or the Referee's (meaning the Referee in Bankruptcy) ignorance of the agreement did not tend to increase the allowances to counsel; whereas there is nothing in the evidence to show what allowances the Court and the Referee in Bankruptcy would have made to counsel to the Trustees if they had known that counsel to the Trustees had

such an agreement with the said Untermyer as the plaintiff claims.

33. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff (meaning the plaintiff's assignor Samuel Untermyer) bore a considerable part in the performance of the services rendered to the estate by counsel for which the Referee and the court commended counsel; whereas he should have found from the evidence that the services for which the Referee and *and* the court commended counsel were the services rendered by the duly appointed general and associate coun[fol. 192] sel to the Trustees and that no part thereof consisted of services rendered by the said Untermyer.

34. For that the said Referee erroneously found and stated in the said Proposed Report that it does not seem to him that the defendants can now contend that the failure to bring this matter to the attention of the Court on subsequent allowances as they did on the Frick sale can be put forward to defeat the plaintiff's contention; whereas he should have found from the evidence and from the law that any failure to bring the alleged agreement as claimed by the plaintiff to the attention of the Court did not and could not cure the illegal, unprofessional and void character of that agreement, which the court would refuse to enforce in the interest of justice.

35. For that the said Referee erroneously found and stated in the said Proposed Report that no such situation existed in the present case as in the case of Marsell v. Mairs, 203 App. Div. 646; whereas he should have found from the evidence and from the law that according to the alleged agreement as claimed by the plaintiff it was part and parcel of that alleged agreement to secure the appointment of George R. Scrugham as sole Trustee and the appointment of the defendants as counsel for the said Scrugham as sole Trustee, the defendants, however, while such counsel, to act as the representative of the said Untermyer and under the orders and directions of the said Untermyer.

36. For that the said Referee erroneously found and stated in the said Proposed Report that the alleged agreement as claimed by the said Untermyer and as found by the

[fol. 193] Referee was not vague, indefinite and unenforceable; whereas he should have found from the evidence and from the law that the said alleged agreement was vague, indefinite and unenforceable in that the division of the fees was subject to the determination of one of the parties to the said alleged agreement, to wit, the said Untermyer.

37. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale; whereas he should have found from the pleadings and the evidence that the plaintiff is entitled to recover no sum whatsoever and that the plaintiff's complaint should be dismissed on the merits.

38. For that the said Referee erroneously found and stated in the said Proposed Report that the plaintiff is entitled to recover from the defendants the sum of $57,064 with interest from November 15, 1920; whereas he should have found from the pleadings and the evidence that the defendants are entitled to judgment dismissing the complaint upon the merits.

And the said defendants take the following exceptions to the report of the Referee, dated January 13, 1926, to wit:

39. They except to so much of the finding of fact numbered "4" in the said Report as finds that the plaintiff's assignor was retained as attorney and counsel for a large [fol. 194] number of creditors of Josiah V. Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that plaintiff's assignor was retained as attorney and counsel for a Creditors' Committee of the creditors of the said Josiah V. Thompson, and not for the creditors of the said Josiah V. Thompson.

40. They except to so much of the finding numbered "5" in the said Report as finds that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson, upon the ground that the said finding is against the weight

of the evidence and without evidence to support it, and he should have found from the evidence that the plaintiff's assignor represented the said Creditors' Committee and not the creditors of said Thompson.

41. They except to so much of the finding numbered "6" in the said Report as finds that plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that plaintiff's assignor acted under the instructions of the said Creditors' Committee and for the benefit of the creditors who had deposited their claims with the said Creditors' Committee.

42. They except to so much of the finding numbered "6" in the said Report as finds that plaintiffs' assignor retained the defendants to conduct bankruptcy proceedings under his supervision, upon the ground that the said finding is [fol. 195] against the weight of the evidence and without evidence to support it, and he should have found from the evidence that plaintiff's assignor retained defendants to institute bankruptcy proceedings against said Thompson, to secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate; and he should further have found from the evidence that the said retainer was limited at the time it was made to the said specific purposes and included no other purposes or objects.

43. They except to so much of the finding numbered "8" in the said Report as finds that bankruptcy proceedings were instituted upon the understanding and agreement as aforesaid (meaning the understanding and agreement referred to in the finding numbered "6"); upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the said bankruptcy proceedings were instituted upon the understanding and agree-

ment that the defendants would institute the same to secure an adjudication in bankruptcy, to act for the Creditors' Committee in the bankruptcy proceedings, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate and that the understanding and agreement under which the said bankruptcy proceedings were instituted was limited to the said specific purposes and included no other purposes or objects.

[fol. 196] 44. They except to so much of the finding numbered "8" in the said Report as finds that after the appointment of the Trustees the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that after the appointment of the Trustees the defendants were duly appointed by the Trustees as counsel to the Trustees and their said appointment as counsel to the Trustees was duly ratified by the Court and that from that time forth the defendants acted solely as such counsel to the Trustees and not in any other capacity; and he should further have found from the evidence that upon the appointment of the defendants as counsel to the Trustees their retainer by the plaintiff's assignor in behalf of the Creditors' Committee ceased and terminated, and from that time forth the defendants acted solely as counsel to the Trustees and in no other capacity.

45. They except to so much of the finding numbered "8" in the said Report as finds that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the interests of the Creditors' Committee represented by the plaintiff's assignor and of the creditors who had deposited their claims with the said Creditors' Committee were in some respects identical with and in other respects contrary to the interests [fol. 197] of the general creditors of the said Thompson.

46. They except to so much of the finding numbered "9" in the said Report as finds that the Trustees in Bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel for the Committee of Creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the Trustees in bankruptcy in selecting the defendants as their counsel did so select them only after the defendants had filed a certificate substantially to the effect that from and after their appointment as counsel to the Trustees they were acting solely as such counsel and not as counsel for the Creditors' Committee or for any creditors.

47. They except to so much of the finding numbered "9" in the said Report as finds that the Trustees in bankruptcy knew of defendants' connection with plaintiff's assignor in relation to such creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that while the Trustees in bankruptcy know that the defendants had theretofore acted as counsel for the Creditors' Committee, they did not know of any alleged agreement or understanding between the defendants and plaintiff's assignor.

48. They except to so much of the finding numbered "10" [fol. 198] in the said Report as finds that after the appointment of the Trustees the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that from and after the appointment of the defendants as counsel to the Trustees, any and all services performed by the defendants were so performed as counsel to the said Trustees and any and all services performed by the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall were so performed by them as attorneys and counsel to the Creditors' Committee.

49. They except to the finding numbered "11" in the said Report and to each and every part thereof upon the ground that the said finding and each and every part thereof is

against the weight of the evidence and without evidence to support it.

50. They except to the finding numbered "12" in the said Report and to each and every part thereof, upon the ground that the said finding and each and every part thereof is against the weight of the evidence and without evidence to support it.

51. They except to so much of the finding numbered "13" in the said Report as finds that any services rendered by the defendants after their appointment as Counsel to the Trustees were rendered pursuant to an agreement between the defendants and the plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have [fol. 199] found from the evidence that any and all services rendered by the defendants after their appointment as counsel to the Trustees were so rendered pursuant to such appointment and not pursuant to any agreement or understanding with the plaintiff's assignor.

52. They except to so much of the finding numbered "13" in the said Report as finds that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the general supervision of the plaitniff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the supervision of the Trustees and of the Court and not under the supervision of the plaintiff's assignor or of the firm of Guggenheimer, Untermyer & Marshall.

53. They except to so much of the finding numbered "13" in the said Report as finds that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the

evidence that any aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall after the appointment of the defendants as counsel [fol. 200] to the Trustees was only such aid, assistance and collaboration as plaintiff's assignor and Guggenheimer, Untermyer & Marshall rendered as attorneys and counsel to the Creditors' Committee and were in duty bound to render in their capacity as attorneys and counsel to the Creditors' Committee.

54. They except to so much of the finding numbered "13" in the said Report as finds that the allowances aggregating $142,659.98 were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the said allowances aggregating the said sum were in part for services in connection with the conservation of the assets of the bankrupt and the realization of large sums therefor and in part for services in connection with the general administration of the estate, including services in connection with contests on the claims of certain creditors.

55. They except to so much of the finding numbered "13" in the said Report as finds that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the evidence that the services for which the said allowances were made were performed by the defendants solely.

[fol. 201] 56. They except to so much of the finding numbered "14" in the said Report as finds that the demand made by plaintiff's assignor upon defendants on or about November 15, 1920 for 40% of the said sum of $142,659.98 was pursuant to any agreement between the plaintiff's assignor and the defendants, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and he should have found from the

evidence that when the said demand was first made it was plaintiff's assignor upon the ground of the relationship of corresponding attorneys and not upon the ground of any alleged agreement and only subsequently was the said demand placed upon the ground of any alleged agreement.

57. They except to so much of the finding numbered "15" in the said Report as finds that the defendants are now indebted to the plaintiff in the sum of $57,064, upon the ground that the said finding is against the weight of the evidence and without evidence to support it, and is contrary to law, and he should have found from the evidence that the defendants are not indebted to the plaintiff in any sum whatsoever.

58. They except to the conclusion numbered "1" in the said Report and to each and every part thereof, upon the ground that the said conclusion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law, and he should have held that the defendants are not, and neither of them is, indebted to the plaintiff in any amount whatsoever.

59. They except to the conclusion numbered "2" in the said Report and to each and every part thereof, upon the [fol. 202] ground that the said conclusion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law, and he should have held that judgment be directed in favor of the defendants together with the costs of this action, including the Referee's fees and stenographer's minutes.

And the defendants take the following exceptions to the Referee's allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, to wit:

60. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "4" as finds that the plaintiff's assignor was retained as attorney and counsel for a large number of creditors of Josiah V. Thompson upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

61. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "5" as

finds that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

62. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "6" as finds that plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

[fol. 203] 63. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "6" as finds the plaintiff's assignor retained the defendants to conduct bankruptcy proceedings under his supervision, upon the ground that the said finding is against the weigh' of the evidence and without evidence to support it.

64. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "8" as finds that bankruptcy proceedings were instituted upon the understanding and agreement as aforesaid (meaning the understanding and agreement referred to in the proposed finding numbered "6"), upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

65. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "8" as finds that after appointment of the Trustees the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

66. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "8" as finds that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said Thompson, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

67. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "9" as finds

[fol. 204] that the Trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel for the Committee of Creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

68. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "9" as finds that the Trustees in bankruptcy know of defendants' connection with plaintiff's assignor in relation to such creditors, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

69. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "10" as finds that after the appointment of the Trustees the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

70. They except to the allowance by the Referee of the proposed finding of fact numbered "11" and to each and every part thereof, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

71. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered pursuant to an agreement between the defendants and the [fol. 205] plaintiff's assignor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

72. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that any services rendered by the defandants after their appointment as counsel to the Trustees were under the general supervision of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

73. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that the services rendered by the defendants after their appointment as counsel to the Trustees were with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

74. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as finds that the allowances aggregating $142,659.98 were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of the creditors and the realization of large sums therefor, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

75. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "12" as [fol. 206] finds that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

76. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "13" as finds that the demand made by plaintiff's assignor upon defendants on or before November 15, 1920, for 40% of the said sum of $142,659.98 was pursuant to any agreement between the plaintiff's assignor and the defendants, upon the ground that the said finding is against the weight of the evidence and without evidence to support it.

77. They except to the allowance by the Referee of so much of the proposed finding of fact numbered "14" as finds that the defendants are now indebted to the plaintiff in the sum of $57,064, upon the ground that the said finding is against the weight of the evidence and without evidence to support it and is contrary to the law.

78. They except to the allowance by the Referee of the proposed conclusion of law numbered "1" and to each

and every part thereof, upon the ground that the said conclusion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law.

79. They except to the allowance by the Referee of the proposed conclusion of law numbered "2" and to each and every part thereof, upon the ground that the said conclu-[fol. 207] sion and each and every part thereof is contrary to the evidence and without evidence to support it and is contrary to the law.

And the defendants take the following exceptions to the Referee's refusals to find the Proposed Findings of Fact and Conclusions of Law submitted by the defendants, to wit:

80. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "4" as reads as follows:

"and it was given the same control thereof substantially as the prior owners had."

81. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "7."

82. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "8."

83. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "10."

84. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "11."

85. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "12."

86. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "13" as reads as follows:

[fol. 208] "The defendants duly accepted their said designation as general counsel to the said trustees, did not thereafter represent creditors except through said trustees, and proceeded to render services as such general counsel, and any and all services thereafter rendered by the defendants

in connection with the said Thompson estate were so rendered as such general counsel to the said trustees."

87. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "14" as reads as follows.

"It was to comply with this rule that the certification by the counsel appointed by the trustees referred to in the foregoing finding was made. At no time did the Court authorize the trustees of the Thompson estate, either specially or otherwise, to retain the said Untermyer or the firm with which he was associated as their attorney or counsel, and in truth and in fact, the said trustees at no time retained either the said Untermyer or the firm with which he was associated as their attorney or counsel."

88. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "15."

89. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "16."

90. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "18" as reads as follows:

[fol. 209] "it was further agreed between the defendants and the said Untermyer that out of the balance remaining after payment to the said associate counsel of their proportionate parts, so much thereof would be paid to the firm with which the said Untermyer was associated as the said Untermyer should designate."

91. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "19."

92. They except to the Referee's refusal to find, as proposed in defendants' proposed finding of fact numbered "20," that the sale of the bulk of the Thompson properties under the Young Option was abandoned.

93. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "21."

94. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "22."

95. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "23."

96. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "24."

97. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "25."

[fol. 210] 98. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "26."

99. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "27."

100. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "28" as reads as follows:

"When the said demand was first made it was placed upon the ground that the said Untermyer was entitled thereto because he had brought the defendants into the Thompson matter and had introduced the said business to the defendants and was entitled thereto because of the relationship of the parties as corresponding attorneys."

101. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "28" as reads as follows:

"Thereafter the said Untermyer demanded 40% of the said sum on the ground of an alleged agreement between him and the defendant Weil, whereby the defendants had agreed that, while general counsel to the trustee, they would act under the orders and directions of the said Untermyer, and had further agreed to pay over to the said Untermyer such proportion as he should fix and designate out of any allowances to be made and paid to the defendants as general counsel to the trustees."

[fol. 211] 102. They except to the Referee's refusal to find so much of the defendants' proposed finding of fact numbered "28" as reads as follows:

"The defendants denied that any such agreement, express or implied, had ever been made and refused to pay

over to the said Untermyer any sum whatsoever on the basis of any such alleged agreement, and further contended that such an agreement, if made, would have been unprofessional, contrary to public policy, a fraud upon the Court, and null and void."

103. They except to the Referee's refusal to find, as proposed in defendants' proposed finding numbered "31," that the sums allowed and paid to the defendant Weil on or about November 30, 1921, and on or about May 10, 1924, were allowed and paid for services which did not include services in connection with any sales of the property of the bankrupt estate and had no reference to preventing disintegration of the estate.

104. They except to the Referee's refusal to find the defendants' proposed finding of fact numbered "32."

105. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "1."

106. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "2."

107. They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

[fol. 212] "The validity of such an agreement as that alleged and set forth in the complaint and in the amended complaint herein filed, and testified to by Mr. Untermyer to have been made between the said Untermyer and the defendants, regarding the division between the said Untermyer and the defendants of the fees to be allowed to the defendants as general counsel for the trustees, is to be determined not by what said parties did thereunder, but by the general tendency of such an agreement."

They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"If that is opposed to the interests of the public, the agreement is void, even though in that particular case the intent of the parties may have been good and no injury to the public may have resulted."

They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption."

They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"The law looks to the general tendency of such contracts, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

[fol. 213] They except to the Referee's refusal to hold so much of the defendants' proposed conclusion of law numbered "3" as reads as follows:

"It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results."

108. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "4."

109. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "5."

110. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "5a."

111. They except to the Referee's refusal to hold the defendants' proposed conclusion of law numbered "6."

Dated New York, January 23, 1926.

Stein & Salant, Attorneys for Defendants. Office & P. O. address: 1328 Broadway, Borough of Manhattan, City of New York. Carter, Ledyard & Milburn, of Counsel for Defendants. Office & P. O. address: 54 Wall Street, Borough of Manhattan, City of New York.

[fol. 214] State of York,
County of New York,
City of New York, ss:

Samuel A. Fenchtwanger, being duly sworn, deposes and says that he is over the age of 18 years. That on the 26 day of February, 1926, at No. 120 B'way in the Boro. of Manhattan, City of New York, he served the foregoing Defendants' Exceptions upon Guggenheimer, Untermyer & Marshall, plaintiff's attorneys in this action, by delivering to and leaving personally with the managing clerk of said attorneys' office a true copy thereof.

Deponent further says that he knew the person served as aforesaid to be the person mentioned and described in —

Samuel A. Fenchtwanger.

Sworn to before me this 26 day of Feb., 1926. Marjorie Reddy, Notary Public, Queens County. Queens County Clk's No. 2098. New York Co. Clk's No. 692. Reg's No. 6025. Bronx Co. Clk's No. 47. Reg's No. 26321. Kings Co. Clk's No. 181. Reg's No. 6288. Commission expires March 30, 1926.

[fol. 215] In United States District Court

[Title omitted]

Order Granting Motion to Confirm Report of Referee—March 12, 1926

This cause having been referred to Allen Wardwell, Esq., as Referee to hear, try and determine the same, and the said Referee having rendered a report wherein he directed judgment in favor of the plaintiff for $57,964, with interest thereon from November 15, 1920, and for the costs and disbursements of the action, including the Referee's fees and stenographer's minutes, and the plaintiff having thereupon moved for an order confirming the report of the Referee and for judgment in accordance therewith, and said motion having thereupon been brought on for hearing before this Court,

Now, on reading and filing the notice of motion to confirm the said report and for judgment thereon dated February [fol. 216] 20, 1926, proof of due service thereof, the affidavit of Laurence A. Steinhardt verified February 20, 1926, referred to in said notice, the order of reference aforesaid and the stipulation on which the same was made, the report of the Referee dated January 13, 1926, the opinion rendered by him, the pleadings, including the amended pleadings, herein, and all of the proceedings theretofore had in this case, in support of the motion, and the defendants having submitted the order removing this case from the Supreme Court of the State of New York to this Court, the order substituting Messrs. Stein & Salant as attorneys for the defendants, the stenographer's minutes of the testimony taken before the Referee and the exhibits offered in evidence on the hearing before him, the defendants' exceptions to the Referees' opinion as submitted prior to the rendition of his report, the requests made to the Referee by the respective parties to pass upon proposed findings of fact and conclusions of law, and the findings made thereon the defendants' exceptions to the report of the Referee, to his allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, and to his refusals to find the proposed findings of fact and conclusions of law submitted by the defendants, and after hearing Louis Marshall, Esq., of counsel for the plaintiff, in support of the said motion, and Louis Salant, Esq., of counsel for the defendants, in opposition thereto, upon motion of Guggenheimer & Marshall, attorneys for the plaintiff, it is

Ordered, that said motion to confirm the report of the Referee be and the same is in all respects granted and that [fol. 217] judgment be entered herein in conformity with the said report in favor of the plaintiff and as against the defendants for the sum of $57,964, with interest thereon from November 15, 1920, and for the costs and disbursements of this action, including the Referee's fees and stenographer's minutes.

Henry W. Goddard, U. S. D. J.

[fol. 218] In United States District Court

[Title omitted]

Judgment

The above-entitled action having been referred to Allen Wardwell, Esq., as Referee to hear, try and determine the issues therein, and said Referee after hearing the parties has duly rendered his report herein in favor of the plaintiff and against the defendants for $57,064.00 with interest from November 15, 1920, together with the costs of this action, including the Referee's fees and stenographer's minutes, and the plaintiff having thereupon moved for an order confirming the report of the Referee and for judgment in accordance therewith and said motion having been granted, and the costs and disbursements of the plaintiff having been duly taxed in the sum of $5,666.60,

Now, on motion of Guggenheimer, Untermyer & Marshall, attorneys for the plaintiff, it is

Adjudged that Edward M. Neary, the plaintiff herein, recover of A. Leo Weil and Charles M. Thorp, the defendants [fol. 219] herein, the sum of $57,064.00 with interest from November 15, 1920, amounting to the sum of $18,260.48, together with the sum of $5,666.60 costs and disbursements as taxed, making in all the sum of $80,991.08, and that said plaintiff have execution therefor.

Dated New York, March 15, 1926.

Alex Gilchrist, Jr., Clerk of the United States District Court, Southern District of New York.

[fol. 220] In United States District Court

[Title omitted]

Petition for Writ of Error

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Now come the defendants, A. Leo Weil and Charles M. Thorp, by Stein & Salant, their attorneys, and say, that

on the 15th day of March, 1926, this Court entered judgment herein in favor of the plaintiff and against the defendants, in which judgment and the proceedings prior thereto in this cause, certain errors were committed to the prejudice of the defendants, all of which will more fully appear from the Assignment of Errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Second Circuit for the correction of the [fol. 221] errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that all further proceedings may be suspended until the determination of the said writ of error by the said Circuit Court of Appeals.

Dated New York, June 10th, 1926.

Stein & Salant, Attorneys for Defendants. Office & P. O. Address: 1328 Broadway, Borough of Manhattan, New York City.

[fol. 222] In United States District Court

[Title omitted]

Order Allowing Writ of Error

Upon the annexed petition this day presented, it is

Ordered that the Writ of Error be allowed to A. Leo Weil and Charles M. Thorp, the petitioners and plaintiffs in error and the defendants in this suit, from the judgment of this Court entered the 15th day of March, 1926, in favor of the plaintiff Edward M. Neary and against the said defendants for the sum of $80,991.08, damages and costs, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Second Circuit, and that a transcript of the record of this Court, including all of the exhibits offered in evidence by either party, be filed in

the United States Circuit Court of Appeals for the Second Circuit, according to law, as prayed for.

Dated New York, June 10, 1926.

Jno. C. Knox, United States District Judge for the Southern District of New York.

[fol. 223] In United States District Court

[Title omitted]

Assignments of Error

Now come the defendants by Stein & Salant, their attorneys, and say that in the record and proceedings in the above entitled action, and in the Referee's Proposed Report and Opinion (undated) filed herein, and in the Referee's Report filed herein dated January 13, 1926, containing the Findings of Fact and Conclusions of Law made by the Referee, and in the allowance by the Referee of certain of the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff, and in the refusal of the Referee to find certain of the proposed Findings of Fact and Conclusions of Law submitted by the defendants, all as confirmed by the Court by its order dated the 12th day of March, 1926, and in entering the judgment dated March 15, 1926, upon the said order, there is manifest error upon which defendants will rely in a prosecution of the writ of error in the above entitled cause in the following particulars:

1. The Court erred in confirming the Report of the Referee as to the Findings of Fact and Conclusions of Law made by him.

[fol. 224] 2. The Court erred in directing that judgment be entered in conformity with the said Report in favor of the plaintiff and against the defendants.

3. The Court erred in entering judgment in favor of the plaintiff and against the defendants.

4. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the plaintiff's as-

signor was retained as attorney and counsel for a large number of creditors of Josiah V. Thompson. (Finding of Fact numbered "4" in Referee's Report dated January 13, 1926.)

5. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson. (Finding of Fact numbered "5" in Referee's Report dated January 13, 1926.)

6. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that in determining to institute bankruptcy proceedings plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors of the said Thompson. (Finding of Fact numbered "6" in Referee's Report dated January 13, 1926.)

7. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that plaintiff's assignor retained the defendants to conduct such bankruptcy proceedings under his supervision. (Finding of Fact numbered "6" in Referee's Report dated January 13, 1926.)

[fol. 225] 8. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that bankruptcy proceedings were instituted upon the understanding and agreement aforesaid (meaning the understanding and agreement referred to in Finding numbered "6"). (Finding of Fact numbered "8" in Referee's Report dated January 13, 1926.)

9. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that after the appointment of the Trustees and in the administration of the Thompson Estate in the bankruptcy proceedings, the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor. (Finding of Fact numbered "8" in Referee's Report dated January 13, 1926.)

9a. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said

Thompson. (Finding of Fact numbered "8" in Referee's Report dated January 13, 1926.)

10. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the Trustees in Bankruptcy, in selecting the defendants as their counsel, realize that they were selecting for that position counsel of the committee of creditors. (Finding of Fact numbered "9" in Referee's Report dated January 13, 1926.)

12. The Referee erred in finding, and the Court erred in [fol. 226] confirming and adopting the finding, that in the course of the administration of the Estate of the said Thompson and after the appointment of the Trustees, the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall. (Finding of Fact numbered "10" in Referee's Report dated January 13, 1926.)

13. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the plaintiff's assignor and the defendants agreed that they should perform any services together after the appointment of the Trustees. (Finding of Fact numbered "11" in Referee's Report dated January 13, 1926.)

14. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that it was mutually agreed that plaintiff's assignor and defendants should collaborate, after the appointment of the Trustees, in rendering such services as were necessary and proper in the bankruptcy proceedings for the conservation of the Estate and the protection of the creditors of the bankrupt. (Finding of Fact numbered "11" in Referee's Report dated January 13, 1926.)

14a. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that it was mutually agreed that the defendants were to receive for the services to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the Court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him. (Find-

ing of Fact numbered "11" in Referee's Report dated January 13, 1926.)

[fol. 227] 15. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that there was an agreement between the plaintiff's assignor and the defendants applying to fees for services rendered after the appointment of the Trustees, in connection with the preservation of the bankrupt's estate against forced sales by mortgagees, judgment creditors and other lienors and the sale of the properties of the estate. (Finding of Fact numbered "12" in Referee's Reptort dated January 13, 1926.)

16. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that any services rendered by the defendants after their appointment as Counsel to the Trustees were rendered pursuant to an agreement between the defendants and the plaintiff's assignor. (Finding of Fact numbered "13" in Referee's Report dated January 13, 1926.)

17. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the general supervision of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall. (Finding of Fact numbered "13" in Referee's Report dated January 13, 1926.)

18. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall. (Finding of Fact num-
[fol. 228] bered "13" in Referee's Report dated January 13, 1926.)

19. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the allowances aggregating $142,659.98 received by the defendants were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor. (Find-

ing of Fact numbered "13" in Referee's Report dated January 13, 1926.)

20. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall. (Finding of Fact numbered "13" in Referee's Report dated January 13, 1926.)

21. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the determination made by the plaintiff's assignor on or about November 15, 1920 that 40% of the said sum of $142,659.98 should be paid to him, was pursuant to any agreement between the plaintiff's assignor and the defendants. (Finding of Fact numbered "14" in Referee's Report dated January 13, 1926.)

21a. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the defendants refused to pay plaintiff's assignor any part of the sum of $142,659.98. (Finding of Fact numbered "15" in [fol. 229] Referee's Report dated January 13, 1926.)

22. The Referee erred in finding, and the Court erred in confirming and adopting the finding, that the defendants are now indebted to the plaintiff in the sum of $57,064. (Finding of Fact numbered "15" in Referee's Report dated January 13, 1926.)

23. The Referee erred in holding, and the Court erred in confirming and adopting the holding, that the defendants are indebted to the plaintiff for 40% of the sum of $142,659.98, to wit: $57,064.00 with interest thereon from November 15, 1920. (Conclusion of Law Numbered "1" in Referee's Report dated January 13, 1926.)

24. The Referee erred in holding, and the Court erred in confirming and adopting the holding, that judgment should be directed in favor of the plaintiff against the defendants. (Conclusion of Law numbered "2" in Referee's Report dated January 13, 1926.)

25. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "4" as finds that the plaintiff's assignor was retained as attorney and counsel for a large number of creditors of Josiah V. Thompson.

26. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "5" as finds that plaintiff's assignor represented from 90% to 95% of the creditors of said Thompson.

[fol. 230] 27. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "6" as finds that in determining to institute bankruptcy proceedings, plaintiff's assignor acted under instructions of the creditors and for the benefit of all of the creditors of the said Thompson.

28. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "6" as finds that plaintiff's assignor retained the defendants to conduct such bankruptcy proceedings under his supervision.

29. The Referee erred in allowing so much of plaintiff's proposed Findings of Fact numbered "8" as finds that bankruptcy proceedings were instituted upon the understanding and agreement aforesaid (meaning the understanding and agreement referred to in the proposed Finding numbered "6").

30. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "8" as finds that after the appointment of the Trustees and in the administration of the Thompson Estate in the bankruptcy proceedings the defendants acted at the instance of plaintiff's assignor and for the creditors represented by plaintiff's assignor.

31. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "8" as finds that the interests of the creditors represented by the plaintiff's assignor were identical with those of the general creditors of the said Thompson.

32. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "9" as finds that the [fol. 231] Trustees in Bankruptcy in selecting the defend-

ants as their counsel realized that they were selecting for that position counsel of the Committee of Creditors.

33. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "9" as finds that the Trustees in Bankruptcy, in selecting the defendants as their counsel, knew of defendants' connection with plaintiff's assignor in relation to such creditors.

34. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "10" as finds that in the course of the administration of the Estate of the said Thompson and after the appointment of the Trustees, the defendants performed services together with the plaintiff's assignor and the firm of Guggenheimer, Untermyer & Marshall.

35. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "11" as finds that plaintiff's assignor and the defendants agreed that they should perform any services together after the appointment of the Trustees.

36. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "11" as finds that it was mutually agreed that plaintiff's assignor and the defendants should collaborate, after the appointment of the Trustees, in rendering such services as were necessary and proper in the bankruptcy proceedings, for the conservation of the estate and the protection of the creditors of the bankrupt.

[fol. 232] 36a. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "11" as finds that it was mutually agreed that the defendants were to receive for the services to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the Court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.

37. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that any services rendered by the defendants after their appoint-

ment as counsel to the Trustees were rendered pursuant to an agreement between the defendants and the plaintiff's assignor.

38. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that any services rendered by the defendants after their appointment as counsel to the Trustees were rendered under the general supervision of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall.

39. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that the services rendered by the defendants after their appointment as counsel to the Trustees were rendered with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall.

40. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that [fol. 233] the allowances aggregating $142,659.98 received by the defendants were made solely for services in connection with the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor.

41. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "12" as finds that a substantial part or any part of the services for which allowances were made to the defendants had been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall.

42. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "13" as finds that the determination made by the plaintiff's assignor on or about November 15, 1920, that 40% of the said sum of $142,659.98 should be paid to him, was pursuant to any agreement between the plaintiff's assignor and the defendants.

42a. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "14" as finds that the defendants refused to pay plaintiff's assignor any part of the sum of $142,659.98.

43. The Referee erred in allowing so much of plaintiff's proposed Finding of Fact numbered "14" as finds that the defendants are now indebted to the plaintiff in the sum of $57,064.

44. The Referee erred in holding in accordance with plaintiff's proposed Conclusion of Law numbered "1" that the defendants are indebted to the plaintiff for 40% of the sum of $142,659.98, to wit: the sum of $57,064 with interest thereon from November 15, 1920.

[fol. 234] 45. The Referee erred in holding in accordance with plaintiff's proposed Conclusion of Law numbered "2" that judgment should be directed in favor of the plaintiff against the defendants.

46. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "4" that the Creditors' Committee was given substantially the same control of the claims of the unsecured creditors which were deposited with it as the prior owners had.

47. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "7," that on or about August 21, 1917, Samuel Untermyer, acting for and on behalf of the Creditors' Committee, informed the defendant A. Leo Weil of the facts substantially set forth in the defendants' proposed Findings numbered "3," "4," and "6."

48. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "7," that the said Untermyer informed the said Weil that he had concluded to institute bankruptcy proceedings against the said Thompson, but that he did not expect the bankruptcy proceedings to be protracted because he hoped and expected that the Young Option would be carried out and if carried out, it would not be necessary to have an adjudication, in any event, if carried out, it would assure a composition in bankruptcy that would be satisfactory to all the creditors.

49. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered [fol. 235] "7," that the said Untermyer thereupon on said day (i. e., on or about August 21, 1917) retained the defend-

ants in behalf of the said Creditors' Committee, and the said defendants accepted the said retainer, to institute bankruptcy proceedings against the said Thompson, secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings, which said Untermyer wanted instituted, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary, proper or advisable to prevent the disintegration of the Thompson estate.

50. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "7," that the agreement made between the said Untermyer and the said Weil on or about August 21, 1917, and the retainer of the defendants by the said Untermyer on or about said date, were limited, at the time they were made, to the following specific purposes, to wit: To institute bankruptcy proceedings against the said Thompson, to secure an adjudication in bankruptcy, to act for said Creditors' Committee in the bankruptcy proceedings which said Untermyer wanted instituted, and in the meanwhile to obtain injunctions and to institute such other proceedings as might be necessary and proper or advisable to prevent the disintegration of the Thompson estate; and the Referee erred in refusing to find, in accordance with the said proposed Finding, that the said agreement and retainer included no other purposes or objects.

51. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered [fol. 236] "7," that it was further agreed between the said Untermyer and the said Weil on or about August 21, 1917, that the defendants would perform the said services under the supervision and direction of the said Untermyer for a fee of Five thousand ($5,000.00) Dollars, or any other sum that the said Untermyer might decide to be fair and reasonable, said fee to be paid to the defendants by the said Creditors' Committee.

52. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "8," that thereupon and pursuant to the said agreement and retainer, the defendants duly instituted proceedings in involuntary bankruptcy against the said Thompson in the

United States District Court for the Western District of Pennsylvania and at or about the same time duly obtained various injunctions and instituted various other proceedings against creditors of the said Thompson to prevent the foreclosure of mortgages, attachments and other liens and to prevent the disintegration of the said Thompson estate.

53. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact number "10," that a large amount of labor was performed by the defendants in the rendition of the services aforesaid and it was thereupon agreed between the said Untermyer and the defendants some time in the month of September, subsequent to the said adjudication in bankruptcy, but prior to the appointment of any trustees in bankruptcy, that the defendants should not be limited to a fee of $5,000 for the said services.

[fol. 237] 54. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "11", that the agrement between the said Untermyer and the defendants referred to in the plaintiff's proposed Finding of Fact No. 7, and the modification thereof referred to in the defendants' proposed Finding of Fact numbered "10", were the only agreements regarding fees made between the said said Untermyer and the defendants until after the consummation of the Frick sale.

55. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "12", that the said agreement and modification thereof was an agreement for the retainer of the defendants on behalf of the Creditors' Committee, that the defendants' actions were to be subject thereunder to the said Untermyer's directions as counsel of said Creditors' Committee, and that the defendants were to receive as compensation for their services to the Creditors' Committee such amount as the said Untermyer should see fit.

56. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "12", that when the said agreement and modification were made, there was no provision as to who the trustee or trustees in bankruptcy were to be, and there was no arrange-

ment as to who was to be counsel for the trustee or trustees.

57. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "12", that when the said agreement and modification were made, it was expected that the sale of the entire property [fol. 238] (except the bank building) under the Young Option would go through promptly and that the trustees and their counsel would not have much to do, except to consummate the Young (or so-called Hill) sale.

58. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "13", that the defendant, after accepting their designation as general counsel to the trustees in bankruptcy, did not represent creditors except through said trustees.

59. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "13", that the defendants, after their designation as general counsel to the trustees in bankruptcy, proceeded to render services as such general counsel, and any and all services thereafter rendered by the defendants in connection with the Thompson Estate were so rendered as such general counsel to the said trustees.

60. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "14", that the certification by the counsel appointed by the trustees, referred to in the defendants' proposed Finding of Fact numbered "13", was for the purpose of complying with Rule 5 of Rules in Bankruptcy of the District Court of the United States for the Western District of Pennsylvania.

61. The referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "14", that at no time did the Court authorize the trustees [fol. 239] of the Thompson estate, either specially or otherwise, to retain the said Untermyer or the firm with which he was associated as their attorney or counsel, and that in truth and in fact, the said trustees at no time retained either the said Untermyer or the firm with which he was associated as their attorney or counsel.

62. The Referee in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "15", that upon the designation of the defendants as general counsel to the trustees, the employment of the defendants by the said Untermyer to act under his direction for the said Creditors' Committee came to an end and terminated, and said defendants did not undertake thereafter in any manner to act for said Creditors' Committee.

63. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "16", that at the time of the designation of the defendants as general counsel to the Trustees as aforesaid, there was no agreement or understanding between the said Untermyer and the defendants, express or implied, that the defendants were to be so designated as general counsel to the Trustees, nor was there at said time an agreement or undertaking between them, express or implied, that the defendants, while general counsel to the Trustees, would act under the supervision or direction of the said Untermer, nor was there at said time any agreement or understanding between them, express or implied, that the defendants would pay over to the said Untermyer any part of the fees to be allowed and paid to them as such general counsel.

[fol. 240] 64. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "18", that upon the consummation of the Frick sale, it was agreed between the defendants and the said Untermyer that out of the balance remaining from the counsel fees to be allowed out of the proceeds of the said sale for services rendered in connection therewith, after payment to the associate counsel of their proportionate parts, so much thereof would be paid to the firm with which said Untermyer was associated as the said Untermyer should designate.

65. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "19", that after the joint petition and application for counsel fees in connection with the Frick sale was presented in the names of the defendants, of the associate counsel to the trustees, and of the firm with which the said Untermyer was

associated, the Court awarded to the said joint petitioners upon their said joint petition and application the sum of $40,000 out of the proceeds of the Frick Sale for their services in connection therewith and the sum of $17,000 thereof was agreed upon as the amount to be paid to the associate counsel, leaving a balance of $23,000 for distribution between the defendants and the said Untermyer or his firm.

66. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "19", that the defendants repeatedly requested the said Untermyer to fix and designate the proportion of the said sum of $23,000 that he desired to be paid to the firm with [fol. 241] which he was associated, but the said Untermyer did not do so and has not done so.

67. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "19", that the defendants have not demanded from the said Untermyer or from the said Creditors' Committee compensation for the services rendered by the defendants prior to their designation as general counsel to the trustees, and the defendants have received no compensation for their said services.

68. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "20", that the sale of the bulk of the Thompson properties under the Young Option was abandoned.

69. The Referee erred in refusing to find, in accordance with Defendants' proposed Finding of Fact numbered "21", that in or about the month of May, 1918, a serious personal disagreement occurred between the said Untermyer and the defendant Weil, arising out of matter not connected with the Thompson estate, of such nature as to make further personal relations between them impracticable and impossible, and it was thereupon agreed between the said Untermyer and the defendant Weil that they and their respective firms should have no further professional relationship of any kind with each other.

70. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered

[fol. 242] "22", that the administration in bankruptcy of the Thompson Estate continued in regular course, and further sales of small portions of estate known as the Rockwell and Dorsey Sales were negotiated and made by the trustees, and in or about the month of June, 1919, the sale of the entire remainder of the said estate, constituting the bulk thereof, was made by the trustees to the Piedmont Coal Company under a contract approved, among others, by the said Creditors' committee and by the said Untermyer, whereby it was provided that the purchasers, in addition to paying to the trustees the purchase price therein named, would also pay to the said Creditors' Committee in full for the services of the said Creditors' Committee and of the said Untermyer as its counsel prior to the bankruptcy and for such assistance as the Creditors' Committee and its said counsel had rendered to the trustees since the adjudication in bankruptcy, an amount not exceeding the sum of $360,000.

71. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "22", that the contract of purchase and sale with the Piedmont Coal Company was duly ratified and approved by the said District Court, and the purchasers did thereupon pay to the said Creditors Committee, pursuant thereto, the greater part of the said sum of $360,000 and will pay the balance thereof upon the fulfillment of certain conditions in said contract of purchase and sales specified.

72. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered [fol. 243] "23", that at no time did the defendants or either of them make any agreement with the said Untermyer, for the payment to the said Untermyer, or to his firm, of any part of the fees allowed or to be allowed to the defendants as general counsel to the trustees, excepting the agreement with respect to the fees allowed for joint services in connection with the Frick sale.

73. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "24", that after the election and appointment of the trustees in bankruptcy, the Creditors' Committee continued to act and to function, and the said Untermyer continued to

act as counsel to the said Creditors' Committee, and the professional services rendered by said Untermyer and the firm of Guggenheimer, Untermyer and Marshall with which he was connected, and his and their associates, were rendered for and on account of said Creditors' Committee and for and on account of the claims upon the bankrupt estate which had been assigned by creditors to said Creditors' Committee, and not as counsel or attorneys for said Trustees.

74. The Referee erred in refusing to find, in accordance with defendants' proposed Finding of Fact numbered "25," that any services rendered by the said Untermyer or Guggenheimer, Untermyer and Marshall, the firm with which he was associated, after the appointment of the trustees, were so rendered by him and them as counsel and attorneys of the Creditors' Committee, and that the said Untermyer agreed to accept as compensation for the said services rendered after the appointment of the trustees and for [fol. 244] such services as he and they rendered prior to the bankruptcy, such sum as he and the Creditors' Committee might agree upon out of the sum of $360,000 stipulated in the said Piedmont Coal Company contract.

75. The Referee erred in refusing to find in accordance with the defendants' proposed Finding of Fact numbered "26," that the claims of the creditors who had deposited their claims with and assigned same to the Creditors' Committee were filed with the Trustees by the Creditors' Committee through the said Untermyer as its counsel.

76. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "26," that many of the said claims were objected to and contested by the trustees and their counsel, whereupon the said Creditors' Committee, through the said Untermyer, nevertheless, insisted upon retaining possession of and title to the said claims and upon defending the regularity of the deposit and assignment thereof to the Creditors' Committee and the regularity of the filing proofs of the said claims by the Creditors' Committee with the trustees, but left the prosecution of the said claims on the merits otherwise to personal counsel selected by such creditors;

a number of said claims so contested were rejected in whole or in part.

77. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "27," that other creditors who had deposited their claims with and assigned them to the Creditors' Committee sought to withdraw the same from the Creditors' Committee and [fol. 245] to make independent proof in their own names of their said claims before the trustees, but the Creditors' Committee through the said Untermyer opposed such action on the part of the said creditors.

78. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "28," that when the said Untermyer's demand was first made that the defendants pay over to him 40% of the sum of $142,659.98, it was placed upon the ground that the said Untermyer was entitled thereto because he had brought the defendants into the Thompson matter and had introduced the said business to the defendants and was entitled thereto because of the relationship of the parties as corresponding attorneys.

79. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "28," that thereafter the said Untermyer demanded 40% of the said sum on the ground of an alleged agreement between him and the defendant Weil, whereby the defendants had agreed that, while general counsel to the trustees, they would act under the orders and directions of the said Untermyer, and had further agreed to pay over to the said Untermyer such proportion as he should fix and designate out of any allowances to be made and paid to the defendants as general counsel to the trustees.

80. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "28," that the defendants denied that any such agreement, express or implied, had ever been made and refused to pay [fol. 246] over to the said Untermyer any sum whatsoever on the basis of any such alleged agreement, and further contended that such an agreement, if made, would have

been unprofessional, contrary to public policy, a fraud upon the Court, and null and void.

81. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "31," that the sum of $21,000 allowed and paid to the defendant Weil on or about November 30, 1921, and the further sum of $23,333.31 allowed and paid to the defendant Weil on or about May 10, 1924, were allowed and paid for services which did not include services in connection with any sales of the property of the bankrupt estate, and had no reference to preventing disintegration of the estate.

82. The Referee erred in refusing to find, in accordance with the defendants' proposed Finding of Fact numbered "32," that there is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

83. The Referee erred in refusing to hold, in accordance with the defendant's proposed Conclusion of Law numbered "1," that there was no agreement made by the defendants with Samuel Untermyer, or with the firm with which said Untermyer was associated for the division of any allowances made for services rendered to the trustees in bankruptcy, saving and excepting the agreement between defendants and the firm with which the said Untermyer was associated, to wit, the firm of Guggenheimer, Untermyer & Marshall, for the division of fees allowed for services in connection with the Frick Sale.

[fol. 247] 84. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "2", that the alleged agreement set forth in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Untermyer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defendants as general counsel to the trustees, was unprofessional, contrary to public policy, illegal, null and void.

85. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "3", that the validity of such an agreement as that

alleged and set forth in the complaint and in the amended complaint herein filed, and tesified to by Mr. Untermyer to have been made between the said Untermyer and the defendants, regarding the division between the said Untermyer and the defendants of the fees to be allowed to the defendants as general counsel for the trustees, is to be determined not by what said parties did thereunder, but by the general tendency of such an agreement.

86. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "3," that if an agreement is opposed to the interests of the public, the agreement is void, even though in that particular case the intent of the parties may have been good and no injury to the public may have resulted.

87. The Referee erred in refusing to hold, in accordance with the defendant's proposed Conclusion of Law num- [fol. 248] bered "3", that it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption, that the law looks to the general tendency of such contracts, that closes the door to temptation by refusing them recognition in any of the courts of the country, and that it is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results.

88. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "4", that when such a contract or agreement as that alleged in the complaint or the amended complaint filed in this case, or in the testimony of the plaintiff, is brought to the attention of the Court, it is the duty of the Court to refuse to enforce such contracts or agreements, for the protection of the administration of justice, regardless of how it may affect the interests of either party to said attempt to enforce said agreement, whether plaintiff or defendant.

89. The Referee erred in refusing to hold, in accordance with the defendant's proposed Conclusion of Law numbered "5", that the alleged agreement set forth in the complaint and in the amended complaint herein and claimed by the plaintiff to have been made between the said Unter-

myer and the defendants regarding the division between the said Untermyer and the defendants of the fees allowed to the defendants as general counsel to the trustees, was vague, indefinite and unenforceable.

90. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law num- [fol. 249] bered "5a", that there is no substantial evidence in this case to support a judgment on the issues involved herein in favor of the plaintiff.

91. The Referee erred in refusing to hold, in accordance with the defendants' proposed Conclusion of Law numbered "6", that the complaint should be dismissed upon the merits, and the judgment should be entered accordingly.

92. The Referee erred in finding and stating in his proposed Report and Opinion that a contract substantially as alleged by the plaintiff did exist.

93. The Referee erred in finding and stating in his proposed Report and Opinion that "this arrangement" (meaning thereby the arrangement made between Samuel Untermyer and the defendants in August and September, 1917, "could properly be applied to fees subsequently allowed to the trustees if in dealing with such fees the parties subsequently understood and interpreted the agreement to apply to such fees."

94. The Referee erred in finding and stating in his proposed Report and Opinion that the defendant Weil's subsequent correspondence with Mr. Marshall constitutes an admission of the receipt by him of Mr. Wickwire's letter of April 26, 1918, Plaintiff's Exhibit 133; whereas he should have found from the evidence that the said letter of Mr. Wickwire, dated April 26, 1918, Plaintiff's Exhibit 133, was not received by the defendant.

95. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendant Weil's letter [fol. 250] to Mr. Untermyer, dated May 7, 1918, Plaintiff's Exhibit 144, cannot be limited to the construction that the said letter referred only to the Frick fees.

96. The Referee erred in finding and stating in his Proposed Report and Opinion that the language of the said letter dated May 7, 1918, Plaintiff's Exhibit 144, is far broader than the fixing of the allowances in connection with the Frick sale and refers to a general arrangement between the parties, but the particular application of this arrangement is to the Frick fees.

97. The Referee erred in finding and stating in his Proposed Report and Opinion that at the time of the writing of the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, no special arrangement had yet been made as to the fixing of the Frick fees.

98. The Referee erred in finding and stating in his Proposed Report and Opinion that the agreement referred to by the defendant Weil in the said letter, dated May 7, 1918, Plaintiff's Exhibit 144, could only be the agreement made prior to the appointment of the Trustees, which Mr. Weil now interprets to refer to compensation allowed by the Trustees.

99. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendant's Weil recognition of the distinction between the compenstion allowed to Mr. Untermyer directly in which he (the said Weil) has no interest, and Mr. Untermyer's interest in the fees allowed to counsel to the Trustees, disposes of the contention made by Mr. Weil in respect to the compensation to [fol. 251] the counsel of the Creditors' Committee allowed upon the consummation of the Piedmont sale.

100. The Referee erred in finding and stating in his Proposed Report and Opinion that the relations between the said Untermyer and his firm on the one hand and the defendants on the other hand were not broken off so far as the Thompson case was concerned by the correspondence which took place between the said Untermyer and the defendant Weil in May, 1918.

101. The Referee erred in finding and stating in his Proposed Report and Opinion that the agreement made between the said Untermyer and the said Weil by their mutual correspondence in May, 1918, that they and their respective firms should have no further relations, did not ap-

ply to the Thompson case, or if it did, it was not carried into effect.

102. The Referee erred in finding and stating in his Proposed Report and Opinion that the parties by their correspondence just cited (meaning the correspondence which took place in April and May, 1918) mutually agreed and understood that the original agreement was meant to and did apply to fees to be received by defendants as counsel for the Trustees.

103. The Referee erred in finding and stating in his Proposed Report and Opinion that there was an agreement between the plaintiff (meaning the said Untermyer) and the defendant with respect to the distribution of the fees re- [fol. 252] ceived by the defendants as counsel to the Trustees in the Thompson Estate and that such agreement was that the amount of such fees, when received, should be divided in such manner as Mr. Untermyer should determine, and that this agreement covered the period from the beginning of the bankruptcy proceedings until the time when the properties were sold, and applied to all fees received by the defendants from the trustees during that period.

104. The Referee erred in finding and stating in his Proposed Report and Opinion that the alleged agreement claimed by the plaintiff was predicated upon the services rendered and to be rendered in connection with the preservation of the state against foreclosures of secured liens and the making of contracts for the sale of the property which would be advantageous to the unsecured creditors.

105. The Referee erred in finding and stating in his Proposed Report and Opinion that there was nothing necessarily illegal or contrary to public policy in the arrangement as claimed by the said Untermyer and as construed by the said Referee.

106. The Referee erred in finding and stating in his Proposed Report and Opinion that there was no conspiracy or plan to bring about the appointment of any special Trustee, nor to collect claims for that purpose, nor to provide for the appointment of counsel for a Trustee to be elected.

107. The Referee erred in finding and stating in his Proposed Report and Opinion that the interests which the said Untermyer represented were not adverse to the general creditors.

[fol. 253] 108. The Referee erred in finding and stating in his Proposed Report and Opinion that the Trustees seem to have gone out of their way to select counsel who already represented a large number of creditors and that the defendants were Untermyer's representatives with respect to those creditors who had deposited their claims with the Creditors Committee.

109. The Referee erred in finding and stating in his Proposed Report and Opinion that Mr. Weil did not at the time he was appointed counsel to the Trustees disclaim that he was acting on behalf of the Creditors Committee.

110. The Referee erred in finding and stating in his Proposed Report and Opinion that Mr. Weil wrote to Mr. Untermyer that he considered himself to have been appointed as Mr. Untermyer's representative and testified that he considered that he continued to represent those interests until the Young-Hill deal fell through.

111. The Referee erred in finding and stating in his Proposed Report and Opinion that the Trustees appear to have forestalled any complication on this ground (meaning the ground that the defendants were counsel to the Creditors Committee) by joining with the counsel for the Creditors Committee two other counsel, one of whom, Judge Umbel, represented other creditors and the other had at one time acted for the Creditors Committee.

112. The Referee erred in finding and stating in his Proposed Report and Opinion that there was no reason to pre- [fol. 254] sume when the contract was made, nor as it was subsequently interpreted, that there would be any adverse interest between the Creditors Committee and the creditors who had not deposited their claims with the Creditors Committee.

113. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendants were on the ground and it was their duty to call the attention of the

Court to the arrangement (meaning the arrangement as claimed by the plaintiff) which they had had with the plaintiff (meaning the said Untermyer) if that was necessary.

114. The Referee erred in finding and stating in his Proposed Report and Opinion that if the agreement which the plaintiff made applied, as the Referee believes it did, to fees other than the fees in the Frick sale, it was the defendants' duty to do whatever was necessary to bring that matter to the attention of the Court.

115. The Referee erred in finding and stating in his Proposed Report and Opinion that if the defendant understood, as the Referee believes he should have understood, that his arrangement with Mr. Untermyer applied to subsequent fees he could and should have insisted that the subsequent applications to which the agreement applied should have been made upon the plaintiff's (meaning the said Untermyer's) behalf as well as on behalf of the other counsel.

116. The Referee erred in finding and stating in his Proposed Report and Opinion that there was nothing in the original arrangement which was not susceptible of being le- [fol. 255] gally carried out, and that if it was the defendant's fault that any appropriate steps were not taken to inform the Court of those facts, he cannot now be heard to plead that failure in his own behalf.

117. The Referee erred in finding and stating in his Proposed Report and Opinion that Weil and Thorp availed themselves to a large extent of the plaintiff's assistance and services in connection with the Thompson Estate, which cannot be considered as rendered on behalf of the Creditors Committee as distinguished from the creditors as a whole.

118. The Referee erred in finding and stating in his Proposed Report and Opinion that the interests of the Creditors Committee were not adverse to those of the general creditors and that the Creditors Committee did not take a position adverse to the general creditors.

119. The Referee erred in finding and stating in his Proposed Report and Opinion that at the time the agreement was made there was nothing intended by the arrangement which would be adverse to the creditors, whether repre-

sented by the Committee or not, nor was there any reason to suppose that any such condition would arise, nor in fact did any such condition arise.

120. The Referee erred in finding and stating in his Proposed Report and Opinion that the potential diversity of interest, arising from the fact that in the proof of claims it might be the duty of the Trustees to object to the claims of the Creditors Committee, would apply to Mr. Weil himself, who did not cease to represent the Creditors Com- [fol. 256] mittee upon his appointment as counsel to the Trustees.

121. The Referee erred in finding and stating in his Proposed Report and Opinion that the only objection to the alleged contract as claimed by the plaintiff and as found by the Referee was that it does not seem in terms to have been made known to the Court or to the Referee in Bankruptcy.

122. The Referee erred in finding and stating in his Proposed Report and Opinion that there is no reason to suppose that had the plaintiff or the defendant called the attention of the Court to the alleged arrangement as claimed by the plaintiff and as found by the Referee there would have been any objection to the plaintiff sharing in these fees.

123. The Referee erred in finding and stating in his Proposed Report and Opinion that certainly the Court's or the Referee's (meaning the Referee in Bankruptcy) ignorance of the agreement did not tend to increase the allowances to counsel.

124. The Referee erred in finding and stating in his Proposed Report and Opinion that the plaintiff (meaning the plaintiff's assignor Samuel Untermyer) bore a considerable part in the performance of the services rendered to the estate by counsel for which the Referee and the Court commended counsel.

125. The Referee erred in finding and stating in his Proposed Report and Opinion that the defendants cannot now contend that the failure to bring this matter to the attention of the Court on subsequent allowances, as they did on the Frick sale, can be put forward to defeat the plaintiff's contention.

[fol. 257] 126. The Referee erred in finding and stating in his Proposed Report and Opinion that no such situation existed in the present case as in the case of Marshall v. Maires, 203 App. Div. 646.

127. The Referee erred in finding and stating in his Proposed Report and Opinion that the alleged agreement as claimed by the said Untermyer and as found by the Referee was not vague, indefinite and unenforcible.

128. The Referee erred in finding and stating in his Proposed Report and Opinion that the plaintiff is entitled to recover 40% of the amounts received by the defendants from the Trustees up to and including the allowances made in connection with the Piedmont sale.

129. The Referee erred in finding and stating in his Proposed Report and Opinion that the plaintiff is entitled to recover from the defendants the sum of $57,064 with interest from November 15, 1920.

Wherefore, defendants pray that the judgment of the said District Court of the United States for the Southern District of New York be reversed, and that the District Court be directed either to grant a new trial in said cause, or to dismiss the complaint and enter judgment in favor of the defendants on the merits.

Dated New York, June 10th, 1926.

Stein & Salant, Attorneys for Defendants, 1328 Broadway, Borough of Manhattan, City of New York.

[fols. 258 & 259] Bond on writ of error for $250.00 approved; omitted in printing.

[fol. 260] Citation, in usual form, omitted in printing.

[fols. 261 & 262] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

A. LEO WEIL and CHARLES M. THORP, Doing Business under the Firm Name and Style of Weil & Thorp, Plaintiffs-in-error,

against

EDWARD M. NEARY, Defendant-in-error

Before Manton, L. Hand, and Swan, Circuit Judges

Writ of error to the District Court for the Southern District of New York. Action by the plaintiff to recover from the defendants for breach of contract. A referee's report in favor of the plaintiff was confirmed by the District Court. Defendants appeal. Affirmed.

Stein & Salant, Esqs., Attorneys for Plaintiffs-in-Error. George W. Wickersham, Esq., John G. Milburn, Jr., Esq., of Counsel.

Louis Marshall, Esq., Counsel for Defendant-in-Error.

MANTON, Circuit Judge:

Josiah V. Thompson, a resident of Uniontown, Pa., engaged in business as a banker and operator of coal mines, became financially involved in 1915. His properties were mortgaged for 19 million dollars and he owed unsecured creditors 15 million more. Samuel Untermyer, an attorney of New York City, was consulted to advise Mr. Thompson in his difficulties. Proceedings were taken in the Pennsylvania State Courts, resulting in the appointment of equity receivers. The appointment of such receivers was revoked by a decision of the Supreme Court of that state and they were discharged and the suit dismissed in 1917. To prevent foreclosure of the mortgages, a petition in bankruptcy was filed, resulting in an adjudication on September 10, 1917.

The plaintiffs-in-error, attorneys at law of Pittsburgh, Pa., were retained by Mr. Untermyer to conduct the bankruptcy proceedings. This retainer was found below to be

an agreement to pay them $5,000 for their services. At the time the defendants below had no interest in nor had they any connection with Thompson or his estate or his creditors. It was found below that Mr. Untermyer was the person most conversant with the affairs of the bankrupt and represented creditors whose interests were identical with those of the general creditors. The trustees in bankruptcy retained the defendants below, by order of the court, and large allowances were subsequently made to them for their services.

In this action, the plaintiff below seeks to recover 40% of such allowances. It was found below that the affairs of the estate were very complicated. It was found that the trustees in bankruptcy "in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendants' connection with plaintiff's assignor in relation to such creditors." Further, that it was recognized that the original retainer of the defendants below on a basis of $5,000 was wholly inadequate for the services necessary and in lieu of the compensation thus originally stipulated "it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him." It was further found that under the general supervision and with the active aid, assistance and collaboration of the assignor of the plaintiff below and his firm who acted for him, services were rendered resulting in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor by the trustees in bankruptcy upon the sale thereof, for which allowances were made in bankruptcy proceedings to an aggregate amount received by the defendants below of $142,658.88. And further, "a substantial part of the services for which

said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him." It was also found that, pursuant to the agreement to determine the division of the allowances made, the assignor of the plaintiffs below determined that the defendants below should retain 60% and pay 40% to him. Notice of such determination was served upon the defendants below.

The claim was assigned by Mr. Untermyer to the present plaintiff. After issue was joined, the matter was referred to a referee "to hear, try and determine the issues and with all the powers to act and rule upon the said trial possessed by the court," and he reported in favor of the plaintiff below, which was confirmed by the court below and from a judgment entered thereon this writ of error has been allowed.

No bill of exceptions was filed and the case is here for review on the judgment roll only. David Lupton & Sons v. Automobile Club, 225 U. S. 489; Demotte v. Whybrow, 263 Fed. 366; Steger v. Orth, 258 Fed. 619. On motion, the bill of exceptions was stricken out because it was not served in time, but the application to dismiss the writ was denied. The application to dismiss is now renewed and is denied. On this review we are at liberty to examine the complaint, answer, findings below and the judgment entered thereon. No stipulation was signed waiving a jury as provided by Sec. 649 of the Revised Statutes. Therefore, by virtue of Sec. 700 of the Revised Statutes, the defendant below is not accorded a right to review the rulings on the law of the court, during the progress of the trial of the cause. Nor are the findings of fact a subject for our review. Fleischmann Co. v. United States, 270 U. S. 349; Duigan v. United States, 274 U. S. 195; Law v. United States, 266 U. S. 494. In the Duigan case, supra, in referring to Secs. 649 and 700 of the Revised Statutes, the court, referring to Sec. 649, said:

"Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or

of the sufficiency of a special finding to support the judgment."

The findings of fact sufficiently support the cause of action pleaded. But it is argued that the complaint, as a matter of law, fails to establish a cause of action. The complaint alleges the agreement as found by the court below and as set forth above. Also that the services of the defendants below were to be rendered under the direction of the assignor of the plaintiff below. At the time of the appointment of the defendants below as attorneys for the trustees, Rule 5 of the Rules of Bankruptcy for the District Court for the Eastern District of Pennsylvania, where the bankruptcy proceedings were pending, was in force and effect. It reads:

"Attorney for the Estate and His Duties.—Unless especially authorized by the Court, Receivers and Trustees in Bankruptcy shall not retain as their attorney the attorney of the bankrupt, of the petitioning creditor, of the person applying for the appointment of a Receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees or who is the attorney for persons holding such proxy."

The argument is that the contract between the parties is against public policy and is illegal and void. This is based upon the claim that it violated the rule referred to; also that it subjected the attorneys for the trustee to the supervision of the assignor of the plaintiff below, who was neither trustee nor attorney to the trustee, and entitled him to compensation allowed by the court for legal services to the trustee in such amount as he may deem just and equitable which, it is said, was contrary to public policy. It is urged upon us that we must, therefore examine the agreement with the closest scrutiny, because it violates the court's control and supervision over the services of attorneys and trustees. Allowances to attorneys for trustees is a matter for the court's determination and it alone has power to fix the compensation and to order its payment out of assets in possession of the trustees. Whether an agreement is opposed to the interest of public

policy is to be determined by its tendency. If it is opposed to the interest of the public, the agreement is void even though in a particular case the intent of the parties may have been good and no injury to the public has resulted. Woodstock Iron Co. v. Richmond etc. Extension Co., 129 U. S. 643; Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261; Sampliner v. Motion Picture Patents Co., 255 Fed. 242. The attitude of the courts toward compensation of attorneys, receivers and trustees of a bankrupt estate may be inferred from Rule XLII of the Supreme Court Rules effective April 13, 1925, subsequent to this allowance. That rule requires attorneys, receivers and trustees seeking an allowance of compensation from a bankrupt estate for the services rendered, to file a petition under oath setting forth not only the statement of services and the amount claimed therefor, but it shall be accompanied by an affidavit of the applicant stating that no agreement has been made directly or indirectly and no understanding exists for a division of fees between the applicant and the receivers, the trustees in bankruptcy or the attorney of any of them, and in the absence of such petition and affidavit, no allowance of compensation shall be made.

But the burden of establishing an agreement to be illegal or against public policy rests upon the person asserting it, and the court will only declare a contract void as against public policy when the case is clear and free from doubt and an injury to the public is substantial, not theoretical and problematical. Hobbs v. McLean, 117 U. S. 567; Oregon R. R. & Navigation Co. v. Dumas, 181 Fed. 781; Richards v. Weiner Co., 207 N. Y. 59; Curtis v. Gokey, 68 N. Y. 300. It is apparent that the parties to this agreement, as found, in retaining the services of the assignor of the plaintiff below, had in mind subserving the interests of the creditors. It was to be expected that Mr. Untermyer, representing 95% of the unsecured creditors and having been in the litigation from the outset as advisor to the bankrupt, could render substantial services on behalf of the creditors and would be useful to conserving the assets out of which dividends might be paid to them. It was he who retained the defendants below. The defendants below

represented no creditors or creditors' committees. They were free to accept assignment as attorneys for the trustee and to represent them. It was not unlawful for them to retain Mr. Untermyer as counsel and thus to obtain competent help in the common effort to bring to the trustees the assets of the estate. In re Champion Wagon Co., 193 Fed. 1004; In re Baber, 119 Fed. 520; In re Abram, 103 Fed. 272; In re Stotts, 93 Fed. 438. Such an agreement is not contrary to public policy. The purpose of Rule V and of the rule of the Supreme Court was not to prevent such employment. It was designed to avoid attorneys actively searching for professional employment in bankruptcy proceedings at their inception and later obtaining their assignment as attorneys for trustees. It was an abuse which sprang from such professional conduct which gave rise to the rule. At no time was an allowance made by the court to Mr. Untermyer, who came within the provisions of Rule V if he applied to the court for compensation. As stated, the finding below is that the defendants below realized that when they were agreeing with Mr. Untermyer for his services, they were consulting counsel for the committee of creditors and knew of his connection in relation to such creditors. His services were accepted; no objection was made to them when tendered. While it is the general rule that a receiver should not employ an attorney for either party to the suit in which he is appointed, and the same rule applies to trustees, it is only where the trustee is actively adverse to one of the parties that there is any impropriety in employing as counsel one who bore such relationship. In re Smith, 203 Fed. 369. At no time did Mr. Untermyer seek compensation from the bankrupt's estate for services rendered and thus come within Rule 5 of the General Orders of Bankruptcy promulgated by the Supreme Court. The defendants below having accepted the cooperation and collaboration of Mr. Untermyer, they had it within their right to pay therefor and to pay out of the compensation allowed to them for the services rendered to the trustees in the course of the administration of the bankrupt's estate. There is no valid objection to attorneys sharing their fees with counsel employed. We must accept the finding establishing the agree-

ment and therefore the promise to pay. Indeed, by statute the right of attorneys and counselors to divide compensation received by them is recognized. Subdiv. 2 of Sec. 274 of the New York Penal Law; Matter of Fitzsimmons, 174 N. Y. 15; Sciolaro v. Asch, 137 App. Div. 667.

The Supreme Court in Watkins v. Sedberry, 261 U. S. 571, overruled objections to an allowance of compensation for services rendered upon an agreement whereby the attorney undertook to recover property belonging to the estate and indemnified the trustee against damages and expenses, and the trustee agreed that any property so recovered should be chargeable with the expenses incurred by the attorney, and the balance to be equally divided between them. The court said that the contract was not on its face unenforceable, was not malum in se, and that the attorney could recover on a quantum meruit. Indeed, it is found below that a substantial part of the services for which allowances were made were performed by the assignor of the plaintiff below. By this agreement the expenses to the estate were not increased and the services inured to the benefit of the estate. The case relied upon by the defendants below—Maguire v. Corwine, 101 U. S. 108—was an action for services by the plaintiff in the U. S. Treasury Department which had designated him as special counsel in prize cases, which restricted him to the selection of a man who was familiar with admiralty practice. Plaintiff entered into the contract with the defendant whereby, in consideration of his procuring the latter's appointment as special counsel, he agreed to pay the plaintiff one-half of the fees which he might receive from the government. This was properly held to be a breach of special duty as well as of trust imposed in the plaintiff. In Marshall v. Maires, 203 App. Div. 646, affirmed 236 N. Y. 516, the terms of compensation were said to have been made by the attorneys for the bankrupt as a consideration for two things, (a) the election of trustees who would appoint the defendant their attorney, and (b) the defendant's appointment by them of such attorneys. This was held to be an illegal agreement. And in Fried v. Danziger, 120 App. Div. 604, the promise of compensation was by a firm of attorneys representing creditors in involuntary bankruptcy proceedings to divide fees with creditors

and the plaintiff claimed that he was entitled to his share of the fees received by the attorney and the number of creditors who were his clients. There the plaintiff had caused a petition in bankruptcy to be filed. The agreement provided for the discontinuance of the bankruptcy proceedings and the continuance of an action previously brought for the distribution of the bankrupt's assets. The agreement was held to be illegal.

But it is argued that the agreement to divide the compensation awarded for the services of the defendants below is so vague and indefinite as to be unenforceable. Allowing Mr. Untermyer to determine what was fair and equitable did not make the agreement vague or indefinite. His judgment was to prevail but it could not be arbitrary or capricious; it was to be fair and equitable. Such agreements are enforceable. Goltra v. Weeks, 271 U. S. 536; Sweeney v. United States, 109 U. S. 618; Ripley v. United States, 223 U. S. 695; Sullivan Co. v. Wingerath, 203 Fed. 460; Robinson v. United States, 251 Fed. 461. The compensation of the defendants below was fixed by the court and the promise of the defendants below was to divide a fair and equitable share with Mr. Untermyer, as determined by him. He having acted and determined what was fair and reasonable, it was sufficient upon which to base liability. No complaint is made that the division is capricious or arbitrary. Such an agreement was neither vague nor indefinite. Londenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298; Klipstein v. Allen, 123 Fed. 992; Jenkins v. Anaheim Sugar Co., 247 Fed. 958; Solter v. Leedom & Worrel Co., 252 Fed. 133; Burgess Fibre Co. v. Broomfield, 180 Mass. 283.

We think a legal and enforceable contract was pleaded and is established by the findings below. The judgment is therefore affirmed.

Judgment affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York,

on the 19th day of December, one thousand nine hundred and twenty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

A. Leo Weil and Charles M. Thorp, Doing Business under the Firm Name and Style of Weil & Thorp, Plaintiffs in Error,

v.

Edward M. Neary, Defendant in Error

Error to the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. A. Leo Weil and another v. Edward M. Neary. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1927. William Parkin, clerk.

United States of America,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of A. Leo Weil and Charles M. Thorp, doing business under the firm

name and style of Weil & Throp, Plaintiffs in Error, against Edward M. Neary, Defendant in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of January, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the said United States the one hundred and fifty-second.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 276] SUPREME COURT OF THE UNITED STATES

Order Allowing Certiorari—Filed March 19, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,188. U. S. Circuit Court of Appeals, Second Circuit. Term No. 736. A. Leo Weil and Charles M. Thorp, doing business under the firm name and style of Weil & Thorp, petitioners, vs. Edward M. Neary. Petition for writ of certiorari and exhibit thereto. Filed February 2nd, 1928. File No. 33,188.

(722)

Supreme Court, U. S.
FILED
FEB 2 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. [redacted] 59

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

A. LEO WEIL,
In Propria Personam and as Counsel for Petitioners.

(33,188)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 736.

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, DIRECTED TO THAT COURT.

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Your petitioners, A. Leo Weil and Charles M. Thorp, formerly and at the time of the occurrences hereinafter referred to associated as law partners as Weil & Thorp, respectfully show:

The United States Circuit Court of Appeals for the Second Circuit, on the 19th day of December, 1927, affirmed a judgment of the District Court of the United States for the Southern District of New York, entered by that court on March 25, 1926, for the sum of $80,991.08 against petitioners and in favor of respondent, Edward M. Neary, the assignee of Samuel Untermyer, said judgment of the Circuit Court of Appeals being final. Said District Court of the United States entered judgment on the report of the Referee, to whom this action had been referred for hearing, without argument and without briefs, such formal entry of judgment being the practice of that court. A copy of the opinion of the Circuit Court of Appeals (not yet reported) appears on page 263 of the record, duly certified, accompanying this petition. Said opinion also appears in the Appendix at page 142.

Statement of the Matters Involved.

I. This action is at law. The respondent, Edward M. Neary, is the assignee of Samuel Untermyer, a member of the bar of the State of New York. The petitioners, A. Leo Weil and Charles M. Thorp, are members of the bar of the State of Pennsylvania and practice their profession in the city of Pittsburgh. The contract in controversy, averred by respondent in his complaint and amended complaint, and which Weil & Thorp by answer and evidence denied, but which, notwithstanding, was found by the court, and on which judgment in this action was entered, was that Weil & Thorp, who had been appointed general counsel by the

trustees in bankruptcy of the Josiah Van Kirk Thompson estate, which appointment was confirmed by the District Court of the United States for the Western District of Pennsylvania, the court having jurisdiction over said bankruptcy proceedings, after their appointment agreed with Mr. Untermyer, who represented a large number of said bankrupt's creditors, to act not only for the trustees and the estate represented by them, but also to act for Mr. Untermyer and "the interests represented by him" and "under the direction" and "under the general supervision" of Mr. Untermyer (Complaint, R., folios 18, 19, 20, 21, pp. 6, 7; Appendix, pp. 2, 3; Amended Complaint, R., folios 94, 96, 107, 108, pp. 31, 32, 33; Appendix, pp. 21, 22, 23); and that when allowances should be made thereafter by the court to Weil & Thorp, as counsel for the trustees, for their services, only such part thereof should be retained by Weil & Thorp for their legal services as Mr. Untermyer should decide they might keep and the balance thereof should be paid to him (R., folios 7219, 7220, pp. 2406, 2407; Appendix, pp. 132, 133); (in other words, that Weil & Thorp were to be nothing more or less than an *alter ego* for Mr. Untermyer), and that neither the trustees nor the court were informed or knew of this agreement. Weil & Thorp, in this action, in their answer and throughout the proceedings in the different courts, denied such a contract, and further contended "that the contract alleged is illegal, void, and unenforceable, because it is contrary to public policy and good morals and is unprofessional and subversive of the due administra-

tion of justice" (*Marshall vs. Maires*, 203 App. Div., 646; affirmed in 236 N. Y., 516).

This certiorari, if allowed, will bring up this question "of importance which it is in the public interest to have decided by the court of last resort" (*Import Co. vs. Joseph*, 262 U. S., 159). It is to the public interest to keep unpolluted and undefiled the streams of the administration of justice.

2. Josiah Van Kirk Thompson, a resident of Uniontown, Pennsylvania, owning a vast acreage of coal lands, became involved financially in 1915. A large number of Thompson's general creditors employed Samuel Untermyer as attorney to represent them in their claims against Thompson. Thompson's indebtedness, secured and general, amounted to many millions of dollars, his general creditors having claims of over $15,000,000. Mr. Untermyer, representing a committee of creditors, had receivers for the estate of said Thompson appointed by the Court of Common Pleas of Fayette County, Pennsylvania (State court). This receivership, however, was set aside on May 7, 1917, by the Supreme Court of Pennsylvania (R., folios 7185-7188, pp. 2395, 2396; Appendix, pp. 121, 122).

3. Mr. Untermyer thereupon concluded that bankruptcy proceedings should be instituted against Thompson. To that end he explained the facts to Weil, of Weil & Thorp, and retained them to institute such bankruptcy proceedings, under his supervision, upon an agreement as to the amount to be paid them for their services for securing an adjudication in

bankruptcy (R., folios 7187, 7188, pp. 2396, 2397; Appendix, pp. 122, 123). This employment was expressly limited to this service.

4. Involuntary bankruptcy proceedings against Thompson were accordingly instituted in the District Court of the United States for the Western District of Pennsylvania, and Thompson was duly adjudicated a bankrupt on or about September 10, 1917 (R., folio 7190, p. 2397; Appendix, p. 123).

5. Trustees for the bankrupt estate were duly appointed and confirmed by the court (R., folio 7143, p. 2381; Appendix, p. 107).

6. *The said trustees thereupon duly designated, and the district court ratified and confirmed the designation of Weil & Thorp as general counsel for the said trustees, upon the petitioners' certificate in writing, required by Rule 5 of said court (hereinafter quoted), that they did not represent any interests which would be in any way antagonistic or adverse to the event they were so employed* (R., folio 7143, p. 2381; Appendix, p. 107).

The Referee so found, but the fact that Weil & Thorp had been employed for the specific purpose only of procuring the adjudication in bankruptcy of Thompson, and had fully performed the purpose of their employment when they were appointed by the trustees and the court general counsel for the trustees (a fact of fundamental importance), was overlooked or disregarded by the Referee in his decision and by the Circuit Court of Appeals in its decision. By their

employment as general counsel to the trustees a new relation was created of Weil & Thorp to this estate. They were thereafter the general counsel for the trustees and the bankrupt estate, duly appointed, qualified and of record, and subject to the duties and obligations and bound by the restraints and limitations as such. They were from that time on officers of the court, and not, and could not be, the agents and associate attorneys of Mr. Untermyer, the attorney of the creditors' committee, as he claims in this action. The petitioners could no longer represent Mr. Untermyer and his creditor clients, which they had done and it was proper to do, in the institution of the bankruptcy proceedings.

7. Weil & Thorp, prior to their appointment as general counsel by the district court, filed their certificate, as required by Rule 5 of that court. They had completed the service for which they had been employed by Mr. Untermyer, namely, they had secured the adjudication as a bankrupt of Mr. Thompson. Rule 5 is as follows:

> "Attorney for the Estate and His Duties.—Unless specially authorized by the court, receivers and trustees in bankruptcy shall not retain as their attorney the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

This rule was in full force and effect in said court during the whole administration of the Thompson estate and still is in force (R., folios 7143, 7146, pp. 2381, 2382; Appendix, pp. 107, 108).

8. Mr. Untermyer was not appointed counsel by the trustees, did not file a certificate with the court, as required by said Rule 5, and was not in any way confirmed or recognized by the court as counsel for the trustees. He could not have complied with said Rule 5, as he admittedly represented a large majority of the general creditors. The trustees and the court had no knowledge or intimation that he claimed or pretended to be associated with or to control and direct the trustees' general counsel, Weil & Thorp.

9. Weil & Thorp, pursuant to their appointment, represented the trustees in contesting disputed claims, some of which were filed by Mr. Untermyer through his creditors' committee, and effected sales of the bankrupt's numerous properties. The proceedings in the district court were involved and cumbersome and required a large amount of legal services. The said district court from time to time, with complimentary allusions to the valuable and able services rendered by Weil & Thorp, allowed them fees for services, upon their petitions.

10. Subsequently, about June, 1921, Edward M. Neary, Mr. Untermyer's assignee, brought his action in law here complained of against petitioners. The averments of said complaints are as follows:

> "Third. The plaintiff's assignor, acting under instructions of the creditors by whom he had

been retained and believing that it would be necessary for the protection of all of the general creditors of the said Thompson that bankruptcy proceedings should be instituted against him in order to prevent the disruption and sacrifice of his estate, determined to institute such bankruptcy proceedings. To that end he informed the defendants on his plans in that regard and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of five thousand dollars ($5,000)."

(Original Complaint, R., folio 17, p. 6; Appendix, p. 2.)

Paragraph third of the Amended Complaint (R., folio 32, p. 31; Appendix, p. 21, is identical.)

"Fourth. Upon the understanding and agreement aforesaid bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court of the United States for the Western District of Pennsylvania, for his adjudication as a bankrupt, and thereupon such proceedings were had that on or about September 10, 1917, the said Thompson was duly adjudicated a bankrupt and trustees of his estate were duly appointed and the administration thereof proceeded, *the defendants herein acting for plaintiff's assignor and the interests represented by him.*"

(Original Complaint, R., folio 18, p. 6; Appendix, p. 2.)

Paragraph fourth of the Amended Complaint (R., folios 93, 94, pp. 31, 32; Appendix, p. 22, is identical.)

> "Fifth. In the course of the administration of the estate of the said Thompson various complications arose which prolonged the period of administration beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings and which rendered it necessary for the defendants to perform more extensive and laborious services than it was originally believed to be necessary in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the compensation of the latter for services in said bankruptcy proceedings was not to be limited to the sum of $5,000, as theretofore stipulated, and in lieu of the compensation originally stipulated *it was agreed that the defendants were to receive for the services rendered by them, out of such allowance as should eventually be made by the court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.*"
>
> (Original Complaint, R., folios 20, 21, p. 7. Appendix, p. 3.)

> "Fifth. In the course of the administration of the estate of the said Thompson, various complications arose which prolonged the period of the administration of the estate beyond that contemplated at the time of the institution of

the aforesaid bankruptcy proceedings, and which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together, to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the plaintiff's assignor, and the firm with which he was associated, should, together, perform such services, and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of five thousand dollars ($5,000), as theretofore stipulated, and in lieu of the compensation originally stipulated, *it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated should collaborate with the defendants under the direction of the former in the performance of such services; and that the defendants were to receive for the services rendered by them, out of such allowance as should eventually be made by the court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him.*"

(Amended Complaint, R., folios 95, 96, p. 32; Appendix, p. 22.)

"Sixth. Pursuant to such arrangement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the*

general supervision of plaintiff's assignor, for which an allowance was, on or about September 20, 1920, made to them in said proceedings by the District Court of the United States for the Western District of Pennsylvania, to be paid out of the estate of the bankrupt, of the sum of one hundred and forty thousand dollars ($140,000) in payment for the services rendered by them in said proceedings, and on or about November 15, 1920, said sum of $140,000 was paid to the defendants by the trustees in bankruptcy of the said Thompson."

(Original Complaint, R., folios 21, 22, pp. 7, 8; Appendix, pp. 3, 4.)

"SIXTH. Pursuant to such arrangement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision of plaintiff's assignor*, and with the active aid of the latter and of the firm with which he was associated, for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918; July 2, 1919, and July 18, 1919, in the total sum of thirty thousand five hundred dollars ($30,500); on or about June 1, 1920, in the sum of forty-five thousand three hundred and sixty-six dollars and sixty-six cents ($45,366.66); on or about October 27, 1920, in the sum of sixty-eight thousand and ninety three dollars and thirty-two cents ($68,093.32); on or about November 30, 1920, in the sum of twenty-one thousand dollars ($21,000), and on or about May 10, 1924, in the sum of twenty-three thou-

sand three hundred and thirty-three dollars and thirty-one cents ($23,333.31), amounting to the total sum of one hundred and eighty-eight thousand and two hundred and ninety-three dollars and twenty-nine cents ($188,293.29), to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and on or about the dates hereinbefore set forth payments were received by the defendants in the amounts above set forth, together aggregating said sum of $188,293.29, which were paid to the defendants by the trustees in bankruptcy of the said Thompson. A substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated."

(Amended Complaint, R., folios 108, 109, p. 33; Appendix, p. 23.)

"SEVENTH. On being informed of such payment to the defendants, plaintiff's assignor, recognizing the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, *determined that a fair and reasonable division of the said sum of $140,000 paid to the defendants as aforesaid was that the defendants should retain* sixty per cent. or eighty-four thousand dollars ($84,000), of the said sum, and that the remaining forty per cent. or fifty-six thousand dollars ($56,000), were to be paid to him, and informed the defendants of his determination with respect to such division."

(Original Complaint, R., folio 24, p. 8; Appendix, p. 4.)

"Eighth. On being informed of such payments to the defendants, plaintiff's assignor, recognizing the aforesaid agreement and the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $188,293.29 paid to the defendants as aforesaid, and of any further sums to be allowed the defendants in said proceedings, was that the defendants should retain sixty per cent (60%) of the said sums received by them and of any further sums allowed them in said proceedings, and that the remaining forty per cent (40%) was to be paid to him, and informed the defendants of his determination with respect to such division."

(Amended Complaint, R., folio 102, p. 34; Appendix, p. 24.)

(The italics in the above paragraphs are ours.)

The amended complaint was filed after the evidence was in. The plaintiff accordingly had every opportunity to know his case. Quotations have been made from both complaints to show that the above statement of the contract is not overstated.

The original and amended complaints contain not a syllable of explanation which would take this case out of the general rule prohibiting contracts between counsel representing hostile interests, or that might become hostile; nor do they contain any allegations that either the trustees or the court were informed or had any knowledge of the alleged agreement.

The referee (R., folios 6952-6970, pp. 2318-2324; Appendix, pp. 66-72) reviews the averments in the complaint, quotes from the same extensively, also the denials of the answer, and concludes (R., folio 6970, p. 2324; Appendix, p. 72):

> "The referee has come to the conclusion that a contract, substantially as alleged by the plaintiff, did exist."

The referee approached the legal objections to this alleged contract from the wrong point of view, and this is in large measure to blame for his erroneous conclusion. Said he (R., folio 7026, p. 2342; Appendix, p. 90):

> ". . . . the referee should not lightly hold an agreement between the parties to be illegal or against public policy which is capable of a construction which would make it consistent with the law and valid."

While this is true as to most contracts, it is not true of contracts that involve and affect the administration of justice and which have a tendency to pollute and contaminate its streams; nor is it true of contracts which involve an alleged agreement between the attorney for trustees in bankruptcy, appointed by the court, on the one side, and one representing a committee of creditors, whose interests may or may not become adverse, on the other. The referee found the agreement to be valid, and gave judgment for the plaintiff, which judgment was affirmed by the district court *pro forma*, and again affirmed by the United States Circuit Court

of Appeals for the Second Circuit. It is this judgment your petitioners seek, by this application for writ of certiorari, to have this Honorable Court review.

11. Your petitioners thus have shown that Mr. Untermyer, although not appointed by the trustees as counsel, nor ratified nor confirmed by the court, as by Rule 5 of said court required, by his own allegations entered into an agreement with Weil & Thorp, as general counsel of the trustees, whereby said duly appointed counsel were required to proceed "under the general supervision of plaintiff's assignor" (R., folios 21, 108, pp. 7, 33; Appendix, pp. 3, 23, —) were required to act "for plaintiff's assignor and the interests represented by him" (R., folio 94, p. 32; Appendix, p. 22), and were required to pay to Mr. Untermyer such part of the fees allowed by the court in bankruptcy as Mr. Untermyer himself should demand.

12. That such an agreement was made, Weil & Thorp denied in their answer and in their evidence. Weil & Thorp attempted in the circuit court of appeals to raise the questions of fact under the evidence, but, on motion of respondent's attorney, the bill of exceptions was stricken out because it was not served in time. Application was also made to dismiss the writ, but that was denied, the court holding:

> "On this review we are at liberty to examine the complaint, answer, findings below, and the judgment entered thereon."
>
> (Opinion, Circuit Court of Appeals, R., 265.)

On this hearing, therefore, the contract must be taken as set forth in the complaints and as found by the referee. For this reason we have quoted at length from the complaints themselves and referred to the opinion of the referee.

We believe this Honorable Court will want to re-examine such an important question as to whether or not any such secret arrangement between counsel for the trustees and counsel for the creditors' committee, as was alleged by Mr. Untermyer and found by the referee, could be sustained.

The decision of the referee and of the circuit court of appeals, if permitted to stand without qualification, will become a menace to honest administration in bankruptcy proceedings and will show that agreements between the officers of the court—the counsel for trustees in bankruptcy—can be made with counsel for a creditors' committee, in defiance of the rules of that court and without the knowledge of the court having the administration of the estate.

The certiorari prayed for "will bring up [those] questions of importance, which it is in the public interest to have decided by the Court of last resort."

The questions thus presented by this petition are as follows:

1. Is an agreement (of which the trustees and court have no knowledge) between general counsel for trustees in bankruptcy and an attorney not appointed or designated by the trustees or court as attorney or counsel for such trustees in bankruptcy enforceable

when that agreement provides that such general counsel shall perform their services "under the direction" and "under the general supervision" of that other attorney and "acting for" that other attorney and for "the interests represented by him"?

2. Is an agreement between the general counsel for trustees in bankruptcy, duly appointed and confirmed, and the attorney for the creditors' committee of the estate, made without the knowledge of trustees or court, enforceable when that agreement provides that said attorneys shall co-operate in their services to the estate, and all allowances made to the counsel to the trustees shall be for the benefit of the attorney for the creditors' committee in such amount as he should decide, and only so much of said allowances kept by the counsel to the trustees as the attorney for the creditors' committee should decide said counsel might retain?

3. Is such an agreement enforceable even if, without the knowledge of trustees or court, such general counsel, pursuant to the said agreement, did render services under the general supervision of the other attorney and acted for him and for the interests which he represented?

4. Is such an agreement enforceable when it provides that out of the allowances to be made to such general counsel by the court the other attorney shall have authority to determine how much thereof shall be re-

tained by the general counsel and how much thereof shall be turned over to the other attorney?

5. Is not such an agreement, under which the general counsel, instead of acting solely for the trustees and under their general direction and supervision, agree to act under the general direction and supervision of that other attorney and for him and for the interests represented by him, contrary to public policy, illegal and void?

6. Is not the vice of such an agreement enhanced by the further provision thereof that such general counsel will divide with such other attorney the fees to be allowed to them by the court, especially under an agreement whereby the other attorney is to determine in his sole discretion how those fees are to be divided?

7. Does not such an agreement tend to deceive the court in which the bankruptcy proceeding is pending, and does not such an agreement tend to corrupt the administration of justice?

8. Is such an agreement, if made without the knowledge or consent of the court, enforceable in view of the provisions of Rule 5 of the Rules in Bankruptcy of the District Court of the United States for the Western District of Pennsylvania?

The agreement, as found by the referee to have been made between the counsel of the trustees in bankruptcy on the one side and the counsel of the committee of creditors, representing a predominating majority of all the creditors, on the other side, is illegal, invalid, and unenforceable.

9. The agreement pleaded and found by the referee is too vague, indefinite, and uncertain to be enforceable.

The trustees in bankruptcy and their counsel are officers of the court which appoints them. Their action must bear the most meticulous scrutiny. Such trustees and counsel are subject to the court's absolute control and supervision. It is immaterial that the particular contract in controversy, as, for example, that here, is not tainted with a perverted motive. The test is the general tendency for evil inherent in all such contracts and not the actual injury in the individual case. The contract alleged and found by the referee could not be more reprehensible, in the eyes of the law, if the trustee in bankruptcy himself had made the same identical agreement alleged with the chairman of the creditors' committee representing a large body of the creditors, the trustee agreeing to work under the direction and supervision of the chairman of the creditors' committee and to divide with the chairman of the creditors' committee whatever allowances should be made to him as commissions by the court, in such proportions as the chairman of the creditors' committee should decide. If such a contract under any circumstances could be sustained, it could not be sustained where secrecy was maintained as to the same and neither the trustees nor the court had any knowledge thereof.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this

Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court, on a date to be designated, a full and complete transcript of the record in the proceedings in said circuit court had in this cause, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the acts of Congress, to the end that the said judgment of the said United States Circuit Court of Appeals for the Second Circuit be wholly set aside, reversed, and annulled by this Honorable Court, and for such further relief as may seem proper.

And your petitioners will ever pray.

A. LEO. WEIL,
CHARLES M. THORP,
Petitioners.

A. LEO. WEIL,
In Propria Persona and as
Attorney for Petitioners.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, a notary public in and for said Commonwealth and county, and residing in the city of Pittsburgh therein, personally appeared A. Leo. Weil and Charles M. Thorp, who, being by me duly sworn, say that they are the petitioners within named, and that they have read the foregoing petition, and that the

statements of fact therein set forth are true and correct, as they verily believe.

A. LEO. WEIL.
CHARLES M. THORP.

Sworn to and subscribed before me this 27th day of January, A. D. 1928.

[SEAL.] L. A. WIRTH,
Notary Public.

My commission expires January 6, 1929.

No. 38080.

ALLEGHENY COUNTY,
State of Pennsylvania, ss:

I, John Vogt, prothonotary of the Court of Common Pleas in and for the county of Allegheny, in the Commonwealth of Pennsylvania, the same being a court of law and record and having a seal, do hereby certify that L. A. Wirth, Esquire, before whom the foregoing affidavit was taken, and who has thereunto, in his own proper handwriting, subscribed his name to the certificate of the proof and acknowledgment of the annexed instrument, was at that time and is now a notary public in and for the Commonwealth of Pennsylvania, resident of said county aforesaid, duly commissioned and sworn and authorized by law to take and certify affidavits and the acknowledgments and proof of deeds to land, etc., to be recorded, to all whose acts as such due faith and credit are, and of right ought to be, given

throughout the United States and elsewhere; and, further, that said instrument is executed in accordance with the laws of this Commonwealth, and that I am acquainted with his signature and believe the same to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, in said county, this 27 day of January, in the year of our Lord one thousand nine hundred and twenty eight.

[SEAL.] JOHN VOGT, *Prothonotary.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 736.

A. LEO WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY, RESPONDENT.

BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

Preliminary Statement under Rule 25.

This is an application for a writ of certiorari to review the affirmance by the Circuit Court of Appeals of the Second Circuit of the judgment entered in the office of the clerk of the United States District Court for the Southern District of New York on March 25, 1926, for the sum of eighty thousand nine hundred and ninety-one and 8/100 dollars ($80,991.08) in favor of respondent and against petitioners.

This action, which is at law, was tried before a referee, and was brought to recover the equivalent of forty per cent (40%) of the allowance that had been made to petitioners as general counsel for trustees in bankruptcy appointed by the U. S. District Court for the Western District of Pennsylvania. Plaintiff's assignor, Samuel Untermyer, claimed to have made with said general counsel, after their appointment, an agreement which, as pleaded in the complaint and as found by the referee, endowed Mr. Untermyer (a member of the bar of the State of New York and attorney for a creditors' committee holding large claims against said estate) with authority to determine what proportion of the allowances for professional services granted to said counsel to the trustees (members of the bar of the State of Pennsylvania) they might retain and the proportion thereof which Mr. Untermyer should receive. The judgment entered upon the confirmation of the referee's report represented the equivalent of forty per cent (40%) of such allowances granted to petitioners, together with interest thereon to the date of the entry of said judgment.

The opinion of the referee has not been officially published. It is found at page 237 of the record. The District Court of the United States rendered no opinion in confirming the report of the referee. The opinion of the circuit court of appeals in affirming the judgment of the district court has not been officially published. It is found at page 263 of the record.

For the convenience of this Court, these opinions, the requests for findings of fact and the referee's an-

swer thereto, and the pleadings have been collated and printed in a separate volume as an appendix to this brief.

Petitioners invoke the jurisdiction of this Court because the situation here presented involves important questions of public policy, the protection from contamination of the streams of justice, and the regulation of the conduct of members of the bar as officers of the court.

The general nature of the cause, the material allegations of the pleadings, and the facts found have been stated in the petition and will not be restated here.

Specification of Errors.

1. The agreement between the parties, alleged in the complaint and amended complaint, as found, construed, and applied by the referee and by the circuit court of appeals, was contrary to public policy, illegal and void.

2. Petitioners were not estopped to plead and rely, in bar of the action, upon the illegality of the contract found by the referee.

3. The agreement alleged in the complaint and amended complaint and found by the referee was vague, indefinite, and uncertain, and therefore unenforceable.

Point I.

The agreement between the parties alleged in the complaint and amended complaint as found, construed and applied by the referee and by the circuit court of appeals was contrary to public policy, illegal and void.

A trustee in bankruptcy and his counsel are officers of the court who so appoints them. Consequently their actions must be such as to bear the most meticulous scrutiny and are subject absolutely to the court's control and supervision.

It is immaterial that the particular contract is not tainted with a perverted motive, for the test is the general tendency for evil inherent in such a contract and not its actual injury.

The vices of the agreement alleged and found and upon which judgment has been rendered are many. By it the general counsel to the trustees in bankruptcy, to whom alone the general counsel owed the obligation of an attorney to a client, agreed to act, not for the trustees and the estate represented by the trustees, but for Mr. Untermyer and the interests represented by him. Owing loyalty to the trustees solely and subject only to their direction and supervision, they agreed instead to act under the direction and supervision of Mr. Untermyer. Appointed as general counsel by the trustees and made officers of the court by the latter's confirmation of that appointment, they agreed, without the knowledge of the trustees or of the court, to act for Mr. Untermyer and the interests represented by him and under his direction and supervision.

Those vices were enhanced, if that were possible, by the provision in the agreement that after allowances were made to the general counsel by the court they should retain out of those allowances only so much as Mr. Untermyer should fix and should turn over the balance to him. A more effective means for securing to Mr. Untermyer control and direction of the general counsel and obedience by them to his dictates cannot well be suggested.

It is no answer to say that Mr. Untermyer represented the bulk of the creditors, and that therefore the interest of his clients was the same as the interest of the trustees in conserving the estate and saving it from disruption. Granting these facts, it is an all-sufficient answer that for good and sufficient reasons the trustees nevertheless selected and the court confirmed the selection of petitioners and not of Mr. Untermyer as counsel to the trustees. Further, while the interests of the clients of Mr. Untermyer might well be identical with the interests of the trustees in many important respects, there might well be other important respects in which those interests would jar and conflict. There could in no event be any certainty in advance that such partial conflict at least would not exist.

The contract found by the referee comes clearly under the rule laid down by Mr. Justice Field in *Providence Tool Co. vs. Norris*, 2 Wall., 45, where he said:

> "The law looks to the general tendency of such agreements and it closes the door to temptation by refusing them recognition in any of the courts of the country."

And again, in *Palm Baum vs. Magulsky*, 217 Mass., 306, at page 308:

> "It is enough that the contract belongs to the class which has a tendency contrary to the public good, although in the particular instance no injury results."

And again it is said in *Greenhood on Public Policy*, at page 5:

> "It matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the general tendency of such contracts."

And again in *Sampliner vs. Motion Picture Patents Co. et al.*, 255 Fed., 242 (1918), C. C. A., So. Dist. of N. Y. (Rogers, C. J.), pp. 251-2:

> "3. The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted. Woodstock Iron Co. *vs.* Richmond, etc. Extension Co., 129 U. S., 643; 9 Sup. Ct., 402; 32 L. Ed., 819; Oscanyan *vs.* Winchester Repeating Arms Co., 103 U. S., 261; 26 L. Ed., 539; Meguire *vs.* Corwine, 101 U. S., 108; 25 L. Ed., 899. As was said by Chief Justice Prentice in Connors *vs.* Connolly, 86 Conn., 641, 656; 86 Atl., 600, 605 (45 L. R. A. [N. S.], 564):
>
> "'It matters not that any particular contract is free from any taint of actual fraud, oppres-

sion, or corruption. The law looks to the general tendency of such contracts.'

"See Greenhood on Public Policy, page 5; Richardson *vs.* Crandall, 48 N. Y., 348. And Mr. Justice Field said in Providence Tool Co. *vs.* Norris, 2 Wall., 45; 17 L. Ed., 868:

"'The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.'

"It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results. Palmbaum *vs.* Magulsky, 217 Mass., 306, 308; 104 N. E., 746; Ann. Cas., 1915D, 799."

The contract in controversy is pregnant with possibilities for evil, the extent whereof is only limited by the imagination.

Let us assume that Mr. Untermyer, the attorney for the creditors' committee, represented through it millions of dollars in claims against the estate. It was naturally to his interest, and it was his duty as counsel for the creditors' committee, to collect these claims placed in its hands and assigned to it. Some of these claims might be doubtful claims. Accordingly, he might say to the attorneys for the trustees, "Do not contest any of these claims represented by us"; and in the event that the attorneys for the trustees would say, "We cannot agree to that; many of these claims are doubtful and are not proper claims against the estate," he could then say to them, "If you contest any of these

claims, I will allow you only a small part of the fee paid to you by the trustees." Or he might say to the attorneys for the trustees, "It is all right for you to contest this claim because I am certain of proving it, but do not contest this other claim, because if you do I might not be able to prove it."

Again, suppose that the creditors' committee had prepared some form of reorganization whereby they proposed to purchase the property of the estate for the benefit of those whose claims were deposited with the creditors' committee, and the price offered was less than the trustees' counsel believed could be obtained from others. Mr. Untermyer might say to the counsel for the trustees, "You are acting under my direction and control. Furthermore, I am to decide what percentage of the fees you are to have. If you oppose this scheme, and if you do not actively assist me in putting it through, I will revenge myself by allowing you a mere pittance out of the fees paid you by the trustees."

Moreover, consider that as the attorneys for the trustees knew that they would not receive the amount of the fees allowed to them by the trustees and the court, but only such portion thereof as Mr. Untermyer should determine, it would be to their interest to demand and seek to obtain from the trustees a much larger amount than they knew their services were otherwise worth and they were satisfied to accept.

So, also, when counsel for the trustees applied to the court for their compensation, it was the duty of Mr. Untermyer, as attorney for the creditors' committee, to examine and pass upon such application. If the fees

requested by the attorneys for the trustees were too large, it was Mr. Untermyer's duty, representing the creditors' committee, to object. If, however, Mr. Untermyer was to receive such fees, and then turn over to the attorneys for the trustees such proportion thereof as he might deem proper, would Mr. Untermyer be unaffected in his attitude toward such allowances?

Under these circumstances, even though intending to act with entire fairness in the matter, would it be proper for Mr. Untermyer to determine whether or not the allowance requested was excessive, without apprising his clients, the creditors' committee, that he had an interest in those fees which were to be allowed to the attorneys for the trustees?

Under Rule 5 of the Rules in Bankruptcy of the court which confirmed the appointment of the petitioners as general counsel, the trustees were prohibited, unless specially authorized by the court, from appointing as their attorney the attorney for any creditor. An agreement by the general counsel to act for one who was the attorney for creditors, no matter how numerous, and for the interests represented by him, i. e., the creditors who were his clients, and to perform services under his direction and supervision, was violative of the letter and the spirit of that rule.

Further citation of authority is perhaps unnecessary, but the following case is so apt to the facts here involved that it will be cited at length.

Marsell vs. Mairs, 203 App. Div., 646 (Affd. without opinion, 236 N. Y., 516), was an appeal by plaintiff

from an order granting defendant's motion for judgment on the pleadings. An involuntary petition in bankruptcy had been filed against the Franklin Brewing Company and an adjudication in bankruptcy was had on January 23, 1917. Prior to that time plaintiff had been counsel for the bankrupt and was familiar with its affairs. The defendant was an attorney. The opinion sets forth the contract sued upon as follows (p. 647):

> "'That thereafter the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of the said bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for the said trustees and to assist the said defendant in the event of his appointment as attorney for the said trustees in all matters of litigation which he might be called upon to do by the said defendant, and said defendant agreed with plaintiff herein that in the event of such appointment as aforesaid, as attorney for the said trustees, that he would pay to the plaintiff herein one third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for the said trustees.
>
> The complaint further alleges that plaintiff used his efforts and assisted in procuring the election and appointment of certain trustees, one of whom was defendant's son, and that he urged upon such trustees the appointment of defendant as their attorney, and that defendant was duly elected and appointed such attorney; that thereafter defendant performed various

services for said trustees, and plaintiff, at defendant's solicitation and request, performed services and carried out every part of the agreement set forth in the complaint, and that on July 29, 1921, defendant was allowed and paid $50,000 for his services as attorney for said trustees, and that by reason thereof plaintiff was entitled to receive from defendant $16,666.66, no part of which has been paid, although demanded.

"The answer denies the material allegation of the complaint, and sets up various defenses as to the legality of the contract."

The motion for judgment on the pleadings was granted upon the ground "that the contract alleged is illegal, void and unenforceable, because it is contrary to public policy, good morals and is unprofessional and subversive of the due administration of justice." The Appellate Division, Second Department, sustained the order and said, at p. 650:

"The probable effect upon the administration of the Bankruptcy Law of such an agreement thus analyzed convinces me that it is an evil thing. It is not enough, in my opinion, that such an agreement may be carried out innocently and in good faith, accomplish its purpose, and also secure properly qualified trustees and an able and conscientious attorney to act for them. The vice lies in the manifold possibilities for evil. A judge may, if permitted, hear his kinsman's case and decide it strictly according to fact and law, and without partiality or favor, but the law forbids such practice because it is

fraught with danger to the administration of justice. So in the case at bar, we may grant the fitness and good faith of the parties, but we cannot permit to be done that which, if established as legal, may and probably would lead to the utter subversion of the purpose and intent of the Bankruptcy Act.

"In *Veazey v. Allen* (173 N. Y., 359, 368), our court of appeals defines public policy in the following language: 'This contract is assailed on the ground of public policy.' Lord Brougham defined public policy as 'that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law.' In many of its aspects the term 'public policy' is but another name for public sentiment and, as that is often transitory or shifting, it lacks the permanency upon which fixed principles of law are, or should be, based. There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner stones of the social edifice is a truism which needs no reenforcement by argument. It may, therefore, be taken for granted that whenever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for the well

> fitting definition of public policy, nor hesitate in its practical application to the law of contracts.'
>
> "Further discussion of the question seems unnecessary. The agreement in question clearly offends public policy, as thus defined. As it is an entire agreement, all parts of which are dependent upon an illegal consideration, it is, therefore, void and cannot be enforced."

The circuit court of appeals misapprehended the contract set up in the pleadings, disregarded the vicious elements thereof, and apparently affirmed an altogether different contract than the one in controversy here and which was before the court for its adjudication. That court held that the attorneys for the trustees could employ Mr. Untermyer to assist them and pay him for his services out of the fees to be received by them as counsel for the trustees. Said that court (Record, p. 269):

> "It is apparent that the parties to this agreement as found, in retaining the services of the assignor of the plaintiff below, had in mind subserving the interests of the creditors * * *. It was not unlawful for them to retain Mr. Untermyer as counsel and thus to obtain competent help in the common effort to bring to the trustees the assets of the estate."
>
> (Citing authorities.)
>
> "Such an agreement is not contrary to public policy."

No fault could be found with this statement of the law. That, however, was not the contract set up in the court below and found by the referee. But even such a contract as that referred to by the court of appeals, if to the same had been added an agreement whereby they not only employed Mr. Untermyer to assist, but counsel for the trustees agreed to abdicate their duties and obligations as counsel for the trustees and to give to Mr. Untermyer the direction, control and supervision of their action as counsel of the trustees, so that in fact and effect he became in their place the counsel for the trustees and they acted solely as his representative and to represent the interests of his clients,—then even under these circumstances, it is apprehended, no court would approve of such a contract, because it would be contrary to public policy and a fraud upon the court, especially if made without the knowledge of either the trustee or the court.

But the contract sued upon specifically states that Mr. Untermyer employed Weil & Thorp, and that they were to act as his agents and for him and "the interests represented by him," and "under the direction" and "under the general supervision" of Mr. Untermyer. (Complaint, R., folios 19, 20, 21, pp. 6, 7; Appendix, pp. 2, 3; Amended Complaint, R., folios 94, 96, 107, 108, pp. 31-33; Appendix, pp. 21-23.)

As showing this complete domination and control and agency, it was provided that all fees received by Weil & Thorp were to be practically held for the account of Mr. Untermyer, who was to determine what portion thereof should be retained by Weil & Thorp

and what amount thereof should be paid over to him; his determination of this question being uncontrolled, there being no allegation even that the division was to be made by agreement between himself and Weil & Thorp.

The contract specifically set forth in the pleadings and found by the referee was not the contract referred to by the court of appeals, but that after their appointment as counsel for the trustees Weil & Thorp agreed with Mr. Untermyer to act for the interests represented by him, under his direction, under his general supervision, and that he was to control the amount of the allowances that should be made to them on account of their services as such counsel to the trustees. It cannot be confounded with, and should not be confused with, the not unusual case of counsel representing trustees employing other counsel to assist them, either generally or in some specific case.

Point II.

Petitioners were not estopped to plead and rely, in bar of the action, upon the illegality of the contract found by the referee.

Under ordinary circumstances one of two parties to a contract might be estopped from making a certain defense because of his conduct. Such is not the case where the defense is that the contract is contrary to public policy or a fraud on the court. In other words, if two parties enter into a contract which is illegal *per se*, as being contrary to public policy, and hence

void, neither party is estopped from raising the question of its invalidity.

The following cases clearly illustrate this principle:

Roberts vs. Criss, 266 Fed., 296 (C. C. A., N. Y.), pp. 299-303:

> "The courts do not aid the parties to illegal agreements. If any principle of law is settled, it is that a party to an illegal undertaking cannot come into court either of law or equity and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio*, and *in pari delicto potior est conditio defendentis*. It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in Holman *vs.* Johnson, 1 Cowper, 341, 343:
>
> "'No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa* or the transgressions of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'"

Among the cases cited in the opinion of the court is *Oscanyan vs. Winchester Repeating Arms Co.*, 103 U. S., 261, where this Court said:

> "The position of the plaintiff that the illegality of the contract in suit cannot be noticed,

> because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration, had it not been earnestly pressed upon our attention by learned counsel * * *. It [the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law * * *. It would not be restrained by defects of pleading, nor indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered."

These authorities answer the argument of the Referee that the defendant as a party to the contract cannot be heard to urge illegality of the contract in suit as being contrary to public policy, because they hold that—

> "the defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff."

We submit that the court, regardless of the action of the parties, when the fact appears that the contract is contrary to public policy, or involves a fraud upon the court, or is of such type as to be a potential fraud upon the court, will refuse its aid to the party seeking to enforce such a contract. This is especially true of the alleged contract in this case as construed and applied, considering its tendency to pervert the administration of justice.

Point III.

The agreement alleged in the complaint and amended complaint and found by the referee was vague, indefinite and uncertain, and therefore unenforceable.

By the agreement as pleaded and found, respondent's assignor was constituted the sole judge as to the manner in which the allowances made to petitioners as attorneys for the Trustees in Bankruptcy should be apportioned between petitioners and respondent's assignor. There is no finding in the Record that respondent's assignor's ultimate determination that sixty per cent (60%) of such allowances might be retained by petitioners and that forty per cent (40%) thereof should be paid to respondent's assignor, was a fair and equitable determination. There is no finding that the services rendered by respondent's assignor justified a compensation to respondent's assignor of forty per cent (40%) of such allowances. As far as appears from the Record, respondent's assignor's determination was arbitrary and without justification in fact. The circuit court of appeals, in sustaining the agreement, said that:

> "Allowing Mr. Untermyer to determine what was fair and equitable did not make the agreement vague or indefinite. His judgment was to prevail but it could not be arbitrary or capricious; it was to be fair and equitable. Such agreements are enforceable" (citing cases). (R., 270.)

There is no finding, however, in this Record that the determination of Mr. Untermyer was fair and equitable. On the contrary, the referee declined to find, as requested by respondent's assignor, that Mr. Untermyer's determination was made "in good faith," or that it was "a fair and reasonable" determination (R., folio 7197, p. 2399, Appendix, p. 125), and the referee specifically declined to find that Mr. Untermyer's determination and decision "were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid" (R., folio 7198, p. 2400, Appendix, p. 126). It is difficult to understand, therefore, upon what theory the circuit court of appeals arrived at the conclusion that the determination made by Mr. Untermyer was fair and equitable.

The courts of New York, where this action was brought, have held that agreements of the kind pleaded and found herein are vague, indefinite and unenforceable.

Varney vs. Ditmars, 217 N. Y., 223.

United Press vs. New York Press Co., 164 N. Y., 406.

Barker vs. O'Grady, 163 N. Y. Supp., 594.

McDonald vs. Acker, Merrill & Condit Co., 192 App. Div., 123.

Canet vs. Smith, 173 App. Div., 241.

Featherstone vs. Fowler, 174 App. Div., 452.

Bluemmer vs. Garvin, 120 App. Div., 29.

In *Barker vs. O'Grady, supra,* the Court said:

> "The plaintiffs allege that they made an oral contract with the defendant under which he agreed to make an 'equitable division' with them of fees received by him as attorney for bankruptcy proceedings. It is impossible to determine the intention of the parties with any reasonable degree of certainty as to what share of the fees each one was to receive, and there is no rule of damages known to the law fine enough to determine what constitutes an 'equitable' division under the terms of the contract. Both plaintiffs and defendant are attorneys and either failed to complete their contract or failed to put it in language sufficiently definite to make it enforceable. * * * In either case the plaintiffs cannot recover upon it."

In *Varney vs. Ditmars, supra,* the Court of Appeals of New York set forth the contract as follows:

> "I am going to give you $5 more a week; if you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started that were in the office three years, on the first of next January I will close my books and *give you a fair share of my profit.*"

The Court held that the contract was unenforceable, and said, at p. 228:

> "It is elementary in the law that, for the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit and that their full intention may be as-

certained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to."

CONCLUSION.

For the foregoing reasons petitioners' counsel respectfully submit that this Court should issue its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the decision discussed in the foregoing.

Respectfully submitted,

A. LEO WEIL,
In Propria Persona and as
Petitioners' Counsel.

PETITIONER'S BRIEF

FILED
SEP 15 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 59

A. LEO. WEIL and CHARLES M. THORP, doing business under the firm name and style of WEIL & THORP, *Petitioners*,

vs.

EDWARD M. NEARY, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS

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James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 59

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of WEIL & THORP, *Petitioners*,

vs.

EDWARD M. NEARY, *Respondent*.

BRIEF FOR PETITIONERS

Reference to Official Report of Opinions Delivered In the Courts Below

Weil et al. vs. Neary, 22 Fed. Rep. (2d series), 893, and (R. 175). No opinion was filed by the United States District Court. Referee's Opinion appears (R. 48); not reported.

Jurisdiction of this Court

While perhaps unnecessary, the question of jurisdiction having been decided in this case, on the granting of the certiorari by this Court, before the adoption of its revised rules,

nevertheless it can do no harm to restate the basis of jurisdiction, in compliance with said revised rules.

(a) Petition for certiorari in this case was presented under Section 240 a, Judicial Code, 43 Stat. L., 938; U. S. Code, Title 28, Sec. 347.

(b) The United States Circuit Court of Appeals, Second Circuit, on the 19th day of December, 1927, affirmed a judgment (R. 183) of the District Court of the United States for the Southern District of New York, entered by that Court on March 15, 1926 (R. 144-5-6), for the sum of $80,991.08, against Weil & Thorp, Petitioners here, who were the defendants in the District Court below, and in favor of the Respondent here (the assignee of Samuel Untermyer), the plaintiff in the District Court below. The said District Court entered its judgment on the report of the Referee (R. 108), to whom this action had been referred. Such entry was a mere formality, without opinion, that being the practice of that Court.

Petition for certiorari was filed February 2, 1928 (R. 185), and allowed March 19, 1928 (R. 185).

(c) The jurisdiction of this Court is invoked:

1. Because this case involves questions of law of supreme importance, relating to the administration of justice by the courts, which it is in the public interest to have adjudicated by this Court. (*Magnum Import Co. et al. vs. Coty*, 262 U. S., 159; 67 L. Ed. 922).

2. Because this case raises questions of the highest public policy in the administration of justice; guarding the courts against secret agreements by opposing counsel; preventing from contamination the streams of justice; and regulating the conduct of members of the bar in Federal bankruptcy cases. [Raised by the Answer (R. 33, Par. 10th); Request refused (R. 101-2); Exception (R. 141-3). Assigned as error Circuit Court of Appeals (R. 169).] The agreement in controversy between the parties hereto appears in the Complaint (R. 17); as found by the Referee (R. 102

108 and 108-114). The judgment had thereon was affirmed by the Circuit Court of Appeals (R. 175-183).

3. Because the agreement made between counsel for the Trustees in Bankruptcy and counsel representing a majority of general creditors, without the knowledge of the Trustees or the Court of Bankruptcy, alleged in the Complaint, found by the Referee, and affirmed by the courts below, by which counsel for the Creditors' Committee was to determine the proportion in which the fees allowed by the Court to counsel to the Trustees were to be distributed between himself and them, was unprofessional, illegal and void, and was vague, indefinite and uncertain, and therefore unenforceable, according to the great weight of authority, especially where the Referee refused to find that such determination was fair, reasonable and equitable. [Request refused (R. 102 at R. 106); Exception (R. 143); Assigned as error Circuit Court of Appeals (R. 173).]

Brief Statement of the Case

Edward M. Neary, plaintiff in the court below, is the assignee of Samuel Untermyer, a member of the bar of the State of New York; A. Leo. Weil and Charles M. Thorp, members of the bar of the State of Pennsylvania, were the defendants in the court below.

The agreement in controversy, as averred in the Complaint and Amended Complaint, was denied by Weil & Thorp, by Answer, and, on the hearing, by evidence. Notwithstanding, the Referee found the agreement substantially as averred in the Complaints, and directed that judgment be entered thereon, which judgment was accordingly entered by the court.

The alleged agreement, as averred in the Complaints, and as found by the Referee, was as follows: that Weil & Thorp, who had been appointed general counsel by the Trustees in Bankruptcy of the estate of J. V. Thompson, and which appointment was confirmed by the District Court of

the United States for the Western District of Pennsylvania, after their appointment as such general counsel, without the knowledge of the Trustees or the Court, entered into an agreement with Samuel Untermyer, who was attorney for a Creditors' Committee representing a large majority in numbers and amount of the creditors of said Thompson, to perform their professional services as such general counsel for the Trustees and the estate represented by them, "under the diriection" (R. 19, 5th Par.) and "under the general supervision" (R. 19, 6th Par., R. 112, 13th Par.) of Mr. Untermyer, and at the same time to act for the interests "represented by" (R. 19, top of page, and R. 56) Mr. Untermyer, and that when allowances should be made by the Court to Weil & Thorp for their services, they were to hold the whole amount of such allowances for the account of Mr Untermyer, who should decide how much thereof Weil & Thorp were to receive and how much he, Mr. Untermyer, should receive (R. 19, 5th Par.).

The agreement as averred in the Complaints and found by the Referee was substantially that while Weil & Thorp, by appointment by the Trustees and confirmation of the Court, were *in name* general counsel for the Trustees, *in truth and fact* they were only employes and agents of Mr. Untermyer, wholly subject to his domination and direction; and, as stated, neither the Trustees nor the Court were advised or informed or knew of this alleged agreement, until this suit was brought.

Weil & Thorp, by their Answers, indignantly denied the making of such a contract, and throughout the proceedings, by their evidence and argument, insisted that no such contract had been made by them, and further attacked the contract alleged, as illegal, void and unenforceable, because contrary to public policy and good morals, unprofessional and subversive of the due administration of justice.

Specifications of Error Intended To Be Urged

1. The agreement between the parties, alleged in the Complaint, found, construed and declared by the Referee and the Circuit Court of Appeals, is contrary to public policy, is unprofessional, would tend to contaminate the streams of justice, and is illegal and void. [Request to this effect refused (R. 101-2); Exception (R. 142-3); Assigned as error Circuit Court of Appeals (R. 169).]

2. The entry of judgment in favor of the respondent here and against the petitioners here, was contrary to law and public policy, subversive of the administration of justice, illegal and void. [Request to this effect refused (R. 101-2); Exception (R. 142-3); Assigned as error Circuit Court of Appeals (R. 169).]

3. The agreement alleged in the Complaint and found by the Referee, was vague, indefinite and uncertain, and therefore unenforceable. [Request to this effect refused (R. 102); Exception (R. 143); Assigned as error Circuit Court of Appeals (R. 173).]

4. The only facts, if any, that would cure the vagueness and indefiniteness of the alleged agreement (if otherwise legal) allowing Mr. Untermyer to determine what was a fair and equitable distribution between himself and Weil & Thorp, were that such determination was not arbitrary or capricious, but fair and equitable, and the Referee refused to so find. (R. 106, 13th Request of defendant in error, plaintiff below, and Answer thereto.)

Argument

THE FACTS UNDER WHICH THIS CONTROVERSY AROSE STATED CHRONOLOGICALLY AND IN DETAIL

1st. J. V. Thompson, of Uniontown, Pa., owning a vast acreage of coal, in 1915 became financially involved. Some of his unsecured creditors employed Mr. Untermyer as attorney to represent them. Thompson's indebtedness, secured and unsecured, aggregated about thirty million dollars. Mr. Untermyer organized a Creditors' Committee, representing, it is alleged, over ninety per cent. of the unsecured creditors, and became their attorney. He had receivers for the estate of said Thompson appointed by the State courts. This receivership was set aside in May, 1917, by a decision of the Supreme Court of Pennsylvania. (R. 90-91.)

2nd. Mr. Untermyer concluded to institute bankruptcy proceedings. He retained Weil & Thorp to institute, under his supervision, such proceedings, and to obtain an adjudication of Mr. Thompson as a bankrupt, upon an agreement that the amount to be paid to Weil & Thorp for their services would be $5,000.00, or such amount as Mr. Untermyer should designate. (R. 110, Par. 6th.)

3rd. Accordingly the bankruptcy proceedings were instituted by Weil & Thorp in Pittsburgh, in the District Court of the United States for the Western District of Pennsylvania, and Thompson was duly adjudicated a bankrupt on September 10, 1917. (R. 110, Par. 8th.)

4th. After said adjudication, trustees for the bankrupt estate were duly appointed. (R. 93, Par. 13th.)

5th. The Trustees appointed Weil & Thorp as general counsel for the Trustees, and the Court confirmed such appointment, upon Weil & Thorp's certificate in writing, under Rule 5 of the District Court, that they did not represent any interest which would in any way be antagonistic or adverse in the event they were so employed. (R. 93-94, Par. 13th.)

6th. Rule 5 above referred to, is as follows (R. 94, Par. 14th):

> "Unless specially authorized by the Court, receivers and trustees in bankruptcy shall not retain as their attorney, the attorney of the bankrupt, of the petitioning creditors, of the person applying for the appointment of a receiver, or of any creditor, and trustees shall not retain as their attorney any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

This Rule was in force and effect before and during the administration of the Thompson estate, and is still in force. (R. 94, Par. 14th.) Weil & Thorp had been employed by Mr. Untermyer, attorney for the Creditors' Committee, to secure the adjudication in bankruptcy and the protection of the estate meanwhile from disintegration by sales or judgments, foreclosure of mortgages, and the like, but after the appointment of the Trustees, and when they were appointed general counsel of the Trustees, they claim they no longer represented Mr. Untermyer and his Creditors' Committee, nor could they legally or professionally have so represented them.

7th. Mr. Untermyer was not appointed counsel to the Trustees, and as attorney for the Creditors' Committee could not have complied with said Rule 5. The Trustees and the Court had no knowledge or information, until this suit was brought, that Mr. Untermyer claimed or pretended to be the associate of Weil & Thorp, as such general counsel to the Trustees, or that there was any agreement that Weil & Thorp, as such general counsel, were to act under the direction and control of said Untermyer, instead of upon their own judgment and initiative. (R. 71.)

8th. Weil & Thorp, as general counsel, *inter alia* represented the Trustees in contesting disputed claims against the estate, some of which were filed by Mr. Untermyer through his Creditors' Committee. (R. 69-71.)

9th. In June, 1921, Edward M. Neary, as the assignee of the claim in controversy of Samuel Untermyer, brought his action at law against Weil & Thorp, on an alleged agreement between Untermyer and Weil & Thorp, which he set up in his Amended Complaint, as follows:

> "Fifth. In the course of the administration of the estate of the said Thompson, various complications arose which prolonged the period of the administration of the estate beyond that contemplated at the time of the institution of the aforesaid bankruptcy proceedings, and which rendered it necessary for the defendants and the plaintiff's assignor and the firm of lawyers with which he was and is associated together to perform more extensive and laborious services than it was originally believed to be necessary for the defendants to perform in the administration of the said estate in bankruptcy. Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that the plaintiff's assignor and the firm with which he was associated should together perform such services and that the compensation of the defendants for services in said bankruptcy proceedings was not to be limited to the sum of five thousand dollars ($5,000.00), as theretofore stipulated, and in lieu of the compensation originally stipulated it was agreed that the plaintiff's assignor and the firm of lawyers with which he was associated *should collaborate with the defendants under the direction of the former in the performance of such services* and that the defendants were to receive for the services rendered by them out of such allowance as should eventually be made by the Court in payment for such services as they should render in said bankruptcy proceedings, such sum as plaintiff's assignor considered just and equitable, the remainder of the amount so allowed being payable to him." (R. 19.)

> "Sixth. Pursuant to such arrangement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision of plaintiff's assignor, and with the active aid of the latter and of the firm with which he was associated,*

for which allowances were made to the defendants from time to time in said proceedings by the District Court of the United States for the Western District of Pennsylvania on or about September 3, 1918, July 2, 1919, and July 18, 1919, in the total sum of thirty thousand five hundred dollars ($30,500); on or about June 1, 1920, in the sum of forty-five thousand three hundred and sixty-six dollars and sixty-six cents ($45,366.66); on or about October 27, 1920, in the sum of sixty-eight thousand and ninety-three dollars and thirty-two cents ($68,093.32); on or about November 30, 1920, in the sum of twenty-one thousand dollars ($21,000); and on or about May 10, 1924, in the sum of twenty-three thousand three hundred and thirty-three dollars and thirty-one cents ($23,333.31), amounting to the total sum of one hundred and eighty-eight thousand and two hundred and ninety-three dollars and twenty-nine cents ($188,293.29), to be paid out of the estate of the bankrupt in payment for the services rendered by the defendants in said proceedings, and on or about the dates hereinbefore set forth payments were received by the defendants in the amounts above set forth, together aggregating said sum of $188,293.29, which were paid to the defendants by the trustees in bankruptcy of the said Thompson. A substantial part of the services for which said allowances were made was performed by the plaintiff's assignor and by the said firm with which he was and is associated." (R. 19-20.)

"Eighth. On being informed of such payments to the defendants, plaintiff's assignor, recognizing the aforesaid agreement and the nature and character of the services rendered by them in the aforesaid bankruptcy proceedings, determined that a fair and reasonable division of the said sum of $188,293.29 paid to the defendants as aforesaid, and of any further sums to be allowed the defendants in said proceedings, was that the defendants should retain sixty per cent. (60%) of the said sums received by them, and of any further sums allowed them in said proceedings, and that the remaining forty per cent. (40%) was to be paid to him, and

informed the defendants of his determination with respect to such division." (R. 20.)

The Amended Complaint was filed after plaintiff's evidence was concluded, on motion of plaintiff's counsel to make the pleadings conform to the proof. Plaintiff accordingly had every opportunity to correctly set forth the alleged agreement on which he founded his claim. Neither the Original Complaint nor the Amended Complaint contained a syllable of explanation justifying a contract between counsel representing hostile interests, or interests that might become hostile, or explaining the imposition and fraud this alleged agreement would be upon the Trustees and the Court, there being no allegation that either the Trustees or the Court were informed or had knowledge of this alleged agreement. (See Plaintiff's Complaint, R. 3, and Amended Complaint, R. 17.)

The Referee, after reviewing these averments of the Complaint, and quoting from the same and the denials of the Answer, and referring to the evidence, concludes (R. 53):

"The Referee has come to the conclusion that a contract substantially as alleged by the plaintiff did exist."

In the Twelfth Request for Findings of Fact by the plaintiff in the District Court below, the Referee was asked to find, and so found (R. 106):

"Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him," &c.

In the Eighth Finding of Fact by the Referee (R. 110), he finds:

"• • • that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said estate was thereupon administered in such bankruptcy proceedings,

the defendants herein acting *at the instance of plaintiff's assignor and for the creditors represented by him* whose interests were identical with those of the general creditors of the said Thompson."

And again, in the Thirteenth Finding of Fact by the Referee (R. 112), he found:

"Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him,* • • •."

(Italics, in above quotations, ours.)

The above citations from the Respondent's own Complaint in the court below, from his own request for Findings of Fact, from the opinion of the Referee, and the Referee's specific Findings of Fact, are perhaps unduly prolix and unnecessary, but are made in an exuberance of caution, so that there can be no controversy as to the character of the agreement set up in the pleadings by the Respondent, the plaintiff in the court below, on which he sought to recover, and because of the position taken by the Respondent in his brief in this Court in opposition to the petition for certiorari.

These citations show that Mr. Untermyer claims, and the Referee so found, to wit: that although not appointed by the Trustees as counsel, or ratified or confirmed as such by the Court, Mr. Untermyer entered into an agreement with Weil & Thorp, after their appointment as general counsel for the Trustees, whereby said duly appointed counsel were required to act "under the general supervision of" Mr. Untermyer (R. 19, Par. 6th, and R. 112); were required to act "for plaintiff's assignor and the interests represented by him" (R. 19 and R. 56); and were required to pay Mr. Untermyer such part of the fees allowed by the Court of Bankruptcy to said general counsel as Mr. Untermyer himself should demand.

Weil & Thorp denied the making of such an agreement in their Answers and in their evidence, and attempted in the

Circuit Court of Appeals to raise all of these questions of fact, under the evidence, by assignments of error, but on motion of Respondent's attorney the bill of exceptions was stricken out, because it had not been served in time. Wherefore, Weil & Thorp could not raise these questions of fact in the Circuit Court of Appeals, nor can they raise them in this Court, on this record. This Court, in this review, as in the Circuit Court of Appeals in the review there, is nevertheless at liberty to examine the Complaint, the Answers, the Findings below, and the judgment entered thereon, and decide the questions of law now raised here in this Court on that record. Petitioners will therefore confine their argument to that record.

The foregoing facts catapult upon the minds of Court and counsel the following grave, significant, serious and momentous questions of public policy and of law, affecting the administration of justice and the protection of its streams from pollution and contamination:

1. Is an agreement enforceable (of which the Trustees and Court have no knowledge) made between general counsel for Trustees in Bankruptcy and an attorney of a Creditors' Committee (not appointed or designated by the Trustees or Court as attorney or counsel for such Trustees), when that agreement provides that such general counsel shall perform their services "under the direction" and "under the general supervision" of that attorney of the Creditors' Committee, and "acting for" that attorney and for "the interests represented by him"?

2. Is an agreement between the general counsel for Trustees in Bankruptcy, duly appointed and confirmed, and the attorney for the Creditors' Committee of the estate, made without the knowledge of Trustees or Court, enforceable, when that agreement provides that said attorneys shall cooperate in their services to the estate, and that all allowances made to the counsel to the Trustees shall be for the benefit of the attorney for the Creditors' Committee, in such amount as he shall decide, and that only so much of said allowances shall be retained by the counsel to the Trustees as the attorney for the Creditors' Committee shall decide said counsel might retain?

3. Is such an agreement enforceable even if, without the knowledge of Trustees or Court, such general counsel, pursuant to the said agreement, did render services under the general supervision of the other attorney, and acted for him and for the interests which he represented?

4. Is such an agreement enforceable when it provides that out of the allowances to be made to such general counsel by the Court, the attorney of the Creditors' Committee shall have authority to determine how much thereof shall be retained by the general counsel and how much thereof shall be turned over to the attorney for the Creditors' Committee?

5. Is not such an agreement,—under which the general counsel, instead of acting solely for the Trustees and under their direction and supervision and that of the Court, agree to act under the general direction and supervision of the attorney for the Creditors' Committee and for him and for the interests represented by him,—against public policy, and therefore illegal and void?

6. Is not the vice of such an agreement enhanced by the further provision thereof that such general counsel will divide with the attorney for the Creditors' Committee the fees to be allowed to such general counsel by the Court, especially where the attorney for the Creditors' Committee is to determine in his sole discretion how those fees are to be divided?

7. Is not such an agreement a fraud on the Court in which the bankruptcy proceeding is pending, and has not such an agreement a tendency to corrupt the administration of justice, and be a vehicle, under conditions that may arise, for contamination and pollution of the streams of judicial procedure?

8. Is such an agreement, if made without the knowledge or consent of the Court, enforceable, in view of the provisions of said Rule 5 [R. 94, Par. 14] of the Rules of Bankruptcy of the District Court of the United States for the Western District of Pennsylvania?

9. Is the agreement pleaded by Respondent, and found by the Referee, too vague, indefinite and uncertain, to be enforceable, especially where there is no allegation by the Respondent (the plaintiff in the court below), and no finding, that the determination of the division of fees by Mr. Untermyer was fair and reasonable, under the facts of the case, but on the contrary the Referee refused to so find?

POINT I

THE AGREEMENT BETWEEN THE PARTIES ALLEGED IN THE COMPLAINT, AND FOUND, CONSTRUED AND APPLIED BY THE REFEREE, WAS CONTRARY TO PUBLIC POLICY, ILLEGAL AND VOID.

A Trustee in Bankruptcy and his counsel are officers of the Court who so appoints them. Consequently, their actions must be such as to bear the most meticulous scrutiny, and are subject absolutely to the Court's control and supervision.

It is immaterial that the particular contract is not tainted with a perverted motive, for the test is the general tendency for evil inherent in such a contract, and not its actual injury.

The vices of the agreement alleged and found, and upon which judgment has been rendered, are many. By it the general counsel to the Trustees in Bankruptcy, to whom alone the general counsel owed the obligation of an attorney to a client, agreed to act, not for the Trustees and the estate represented by the Trustees, but for Mr. Untermyer and the interests represented by him. Owing loyalty to the Trustees solely, and subject only to their direction and supervision and that of the Court, they agreed instead to act under the direction and supervision of Mr. Untermyer. Appointed as general counsel by the Trustees and made officers of the Court by the Court's confirmation of that appointment, they agreed, without the knowledge of the Trustees or of the Court, to act for Mr. Untermyer and the interests represented by him, and under his direction and supervision.

These views were enhanced, if that were possible, by the provision in the agreement that after allowances were made to the general counsel by the Court they should retain out of those allowances only so much as Mr. Untermyer should fix, and should turn over the balance to him. A more effective means for securing to Mr. Untermyer control and direction of the general counsel to the Trustees, and obedience by them to his dictates, can not well be imagined.

It is no answer to say that Mr. Untermyer represented the bulk of the creditors, and that therefore the interest of his clients was the same as the interest of the Trustees in conserving the estate and saving it from disruption. Granting these facts, it is an answer that for good and sufficient reasons the Trustees nevertheless selected and the Court confirmed the selection of Weil & Thorp, and not Mr. Untermyer, as counsel to the Trustees. Further, while the interests of the clients of Mr. Untermyer might be identical with the interests of the Trustees in many important respects, there might well be other important respects in which those interests would not be identical, but would conflict, as they subsequently did. There could in no event be any certainty in advance that such conflict would not arise. There was almost a certainty that it would arise, just as it did.

The contract pleaded and found by the Referee comes clearly under the Rule laid down by Mr. Justice Field, in *Providence Tool Co.* vs. *Norris*, 2 Wall., 45, where he said:

> "The law looks to the general tendency of such agreements and it closes the door to temptation by refusing them recognition in any of the courts of the country."

The authorities are collated in *Stauffiger* vs. *Medina Picture Patents Co., et al.*, 225 Fed. 212 (1915), C. C. A., 2d Dist. N. Y., (Rogers, C. J.), pp. 214-2:

> "2. The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the Public, the agreement is void, even though in the particular case the intent of the parties

may have been good and no injury to the public may have resulted. *Woodstock Iron Co. v. Richmond, etc., Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; *Gonzales v. Winchester Repeating Arms Co.*, 162 U. S. 264, 26 L. Ed. 539; *Meguire v. Corwine*, 101 U. S. 108, 25 L. Ed. 899. As was said by Chief Justice Prentice in *Connors v. Connolly*, 86 Conn. 641, 656, 86 Atl. 698, 665, (45 L. R. A. (N. S.) 264):

> "It matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts."

See Greenhood on Public Policy, p. 5; *Richardson v. Crandall*, 68 N. Y. 348. And Mr. Justice Field said in *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868:

> "The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."

It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results. *Fuimbeano v. Mapoledy*, 217 Mass. 206, 209, 104 N. E. 706, Ann. Cas. 1915D, 799."

The contract in controversy is weighed down with obvious probabilities for evil, and the extent of the load of probabilities for evil is limited only by the exuberance of one's imagination.

The following examples are submitted: Mr. Untermyer, the attorney for the Creditors' Committee, represented millions of dollars in claims against the estate. It was to his interest, as it was his duty, to collect these claims in the hands of the Committee and assigned to it. Some of these claims might be doubtful. Accordingly, he might say to the attorneys for the Trustees, "You agreed to act under my supervision. Do not enforce any of these claims represented

by us. If you do, I will allow you only a small part of the fee paid to you by the Trustees." Or he might say to the attorneys for the Trustees, under the same threat, express or implied, "It is all right for you to contest this claim, because I can prove it, but do not contest this other claim, because I might not be able to prove it."

Again, suppose that the Creditors' Committee had some plan of reorganization whereby they proposed to purchase the property of the estate for the benefit of those whose claims were deposited with the Creditors' Committee, and the price offered was less than the Trustees' counsel believed could be obtained from others. Mr. Untermyer might say to the counsel for the Trustees, "You are acting under my direction and control. Furthermore, I am to decide what percentage of the fees you are to have. Oppose my plan of reorganization at your peril."

Again, consider that as the attorneys for the Trustees knew that they would not receive the amount of the fees allowed to them by the Trustees and the Court, but only such portion thereof as Mr. Untermyer should determine, it would be to their interest to demand and to try to obtain from the estate a much larger allowance than they otherwise would ask.

So, also, when counsel for the Trustees applied to the Court for their allowances, it was the duty of Mr. Untermyer, as attorney for the Creditors' Committee, to object, if the fees requested were too large. If, however, Mr. Untermyer was to receive such proportion thereof as he might decide, could Mr. Untermyer be impartial in deciding whether or not to object?

Under such a contract, would it be proper for Mr. Untermyer to determine whether or not the allowances requested were excessive, without apprising his clients, the Creditors' Committee, that he had an interest in those allowances?

Illustrations of the evil possibilities of such an agreement could be indefinitely multiplied.

Under Rule 5 (R. 94, Par. 14th) of the Rules in Bankruptcy of the Court which confirmed the appointment of

Weil & Thorp as general counsel, the Trustees were prohibited, unless specially authorized by the Court, from appointing as their attorney the attorney for any creditor. An agreement by the general counsel to act for the attorney of the Creditors' Committee,—no matter how many creditors nor how large an amount such Committee controlled—and for their interests, and under the direction and supervision of the attorney of the Creditors' Committee, was contrary to the letter and the spirit of that Rule, and in direct violation thereof.

Further citation of authority is perhaps unnecessary, but the opinion of the Court in the following case is so apt that it will be cited.

Marsell vs. Moires, 203 App. Div., 646 (Affirmed without opinion, 236 N. Y., 516), was an appeal by plaintiff from an order granting defendant's motion for judgment on the pleadings, on the ground "that the contract alleged is illegal, void and unenforceable, because it is contrary to public policy, good morals, and is unprofessional and subversive of the due administration of justice." The Appellate Division, Second Department, sustained the order, and said, at page 650:

> "The probable effect upon the administration of the Bankruptcy Law of such an agreement thus analyzed convinces me that it is an evil thing. It is not enough, in my opinion, that such an agreement may be carried out innocently and in good faith, accomplish its purpose, and also secure properly qualified trustees and an able and conscientious attorney to act for them. The vice lies in the manifold possibilities for evil. A judge may, if permitted, hear his kinsman's case and decide it strictly according to fact and law, and without partiality or favor, but the law forbids such practice because it is fraught with danger to the administration of justice. So in the case at bar, we may grant the fitness and good faith of the parties, but we can not permit to be done that which, if established as legal, may and probably would lead to the utter subversion of the purpose and intent of the Bankruptcy Act.

In *Veazey vs. Allen* (173 N. Y., 359, 368), our Court of Appeals defines public policy in the following language: 'This contract is assailed on the ground of public policy. Lord Brougham defines public policy as "that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." In many of its aspects the term "public policy" is but another name for public sentiment, and, as that is often transitory or shifting, it lacks the permanency upon which fixed principles of law are, or should be, based. There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency, is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner-stones of the social edifice is a truism which needs no re-enforcement by argument. It may, therefore, be taken for granted that whenever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for the well-fitting definition of public policy, nor hesitate in its practical application to the law of contracts.'

Further discussion of the question seems unnecessary. The agreement in question clearly offends public policy, as thus defined. As it is an entire agreement, all parts of which are dependent upon an illegal consideration, it is, therefore, void and can not be enforced."

The disfavor with which an agreement for the division of fees between the attorneys for Trustees in Bankruptcy and the Receiver, or the Trustees, or the bankrupt, or the attorney of any of them, is regarded, is shown by Order XLII, General Orders in Bankruptcy, promulgated April 13, 1925 (267 U. S., 614, 615). While the division of fees between an attorney for the Trustees and an attorney for a Creditors'

Committee is not specifically enumerated in this Order, because perhaps not present at the time in the minds of the Court, nevertheless such an agreement would be subject to the same general objections, if not even greater than those that influenced this Court in adopting the above mentioned Order XLII.

In any event, while it is not contended that said Order in terms applies to the facts of this case, it clearly shows the disfavor with which this Court regards agreements by attorneys for Trustees in Bankruptcy to divide their fees. And so it may well be. As an officer of the Court, owing extraordinary loyalty to that Court, such attorney must keep himself free from any conflicting duties and obligations that could by any possibility, however remote, reduce this loyalty or affect it.

SOME ABERRATIONS OF COUNSEL FOR RESPONDENT AND THE REFEREE IN THE ARGUMENT, CONSIDERATION AND DECISION OF THIS CASE, DUE TO MISAPPREHENSION OF FACTS AND LAW.

Mr. Untermyer, in his Complaint and in his evidence, and in his Requests for Findings of Fact, emphasizes and again and again points out that he was appointed counsel for the Creditors' Committee *to conserve and preserve from disintegration* the Thompson estate, so that it could be distributed without preference, among general creditors whom he represented; that he organized the Creditors' Committee for this purpose; that he had receivers appointed by the State court for this purpose; that when the receivers were discharged he had bankruptcy proceedings initiated for this purpose; and that he collaborated with counsel for the Trustees for this purpose; and succeeded in his efforts and in obtaining large sums for distribution among the general creditors; and, therefore, that the agreement in controversy had for its purpose and intent a legitimate purpose and consideration, and was free from objection. And the Referee, in his findings on the Requests for Findings of Fact made by the plaintiff, and in his report of facts, adopts almost ver-

batim many of the Requests for Findings of Fact made by plaintiff, and in his opinion follows the same line of reasoning, and apparently holds, for those reasons, that the alleged agreement between Mr. Untermyer and Weil & Thorp was not void, as against public policy.

This line of reasoning involves an astigmatic view of the law and the facts, for the following reasons:

1st. Mr. Untermyer was employed as attorney for such unsecured creditors of Thompson as he represented, for the sole purpose of conserving and preserving the estate for distribution among general creditors.

2nd. It was his duty to his clients, by whom he was hired and paid, to do this, and he did it, as attorney for those clients, first in organizing a large majority of the creditors into a committee, and then as attorney for the Creditors' Committee in having receivers appointed by the State courts, and, when the receivers were discharged, in having Thompson adjudicated a bankrupt, and then, after trustees for the administration of the estate were appointed, in cooperating and advising with the attorneys for the Trustees in Bankruptcy; all of this for the same purposes and to accomplish the same end.

3rd. Congress in enacting, and the courts in administering, the bankruptcy law, had and have as their chief end and purpose the conservation and preservation of the estate of bankrupts and the distribution thereof among the general creditors without preference. All the arguments, findings and deductions sought to be drawn from this work of Mr. Untermyer in the conservation, preservation, and prevention of preferences, in the distribution of his estate, in any other capacity than as attorney for the Creditors' Committee, are unwarranted, because that was exactly what he was bound to do as attorney for the Creditors' Committee, or else be recreant to his trust.

4th. Mr. Untermyer and the Referee ignored the fact that there were two separate periods, in one of which Weil & Thorp properly stood to Mr. Untermyer in one relationship,

and in the other in an altogether different relationship. The first period was when, employed as attorneys for the Creditors' Committee by Mr. Untermyer, they were to act under his direction, supervision and control, and secure the adjudication in bankruptcy; and the second period was when Weil & Thorp, having completed the purposes of their employment by the Creditors' Committee, were appointed general counsel for the Trustees, and, as shown by their declaration under said Rule 5 (R. 94), ceased to represent Mr. Untermyer and his Creditors' Committee, except in so far as they represented any and all creditors as general counsel to the Trustees in Bankruptcy.

The Referee found, however, as was claimed by Mr. Untermyer, that by some agreement between Mr. Untermyer and Weil & Thorp, made after Weil & Thorp were appointed counsel to the Trustees, the agreement for the first period, with some modifications as to compensation, was continued during the second period, and that Weil & Thorp, though attorneys for the Trustees, still continued to act at the instance of Mr. Untermyer for him and for the clients represented by him, and under the domination and control of Mr. Untermyer, and subject to his direction both as to their services and as to their compensation, and this notwithstanding the fact that the Trustees and the Court were not advised and did not know of any such agreement. In other words, Mr. Untermyer contends that when the Trustees and the Court appointed and ratified Weil & Thorp as general counsel for the Trustees, while "the voice was the voice of Jacob, the hands were the hands of Esau"; that Samuel Untermyer in fact, and not Weil & Thorp, was the general counsel of the Trustees, in the dress, under the name, and speaking with the voice of Weil & Thorp.

5th. Much has been made heretofore, in argument by counsel for Respondent, of the Ninth Finding of Fact by the Referee (R. 111), which is as follows:

> "The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors who were represented by plaintiff's assignor, and

knew of defendants' connection with plaintiff's assignor in relation to such creditors."

The facts thus found are that the Trustees, when they selected Weil & Thorp as their counsel, knew that Weil & Thorp had made the application for the adjudication of Thompson in bankruptcy as attorneys for the Creditors' Committee, at that time representing and acting for their counsel, Mr. Untermyer. This was a matter of record, about which there could have been no question. The certificate and affidavit of Weil & Thorp, under Rule 5 (R. 94), showed that this representation and relationship had been terminated. This is very far, as far apart as the poles, from any finding that the Trustees knew or suspected that Weil & Thorp would continue, after their appointment as attorneys for the Trustees, notwithstanding their certification to the contrary, in the employment of and as attorneys for the Creditors' Committee, under the supervision, control and direction of Mr. Untermyer, and solely as his mouthpiece. No such finding of knowledge as the above was made or implied by the Referee by anything in this record.

THE CIRCUIT COURT OF APPEALS MISAPPREHENDED THE CONTRACT, THE LEGALITY OF WHICH WAS INVOLVED IN THE HEARING BEFORE IT, AND IN ITS DECISION AFFIRMED AN ALTOGETHER DIFFERENT CONTRACT, WHICH THE REFEREE DID NOT FIND, AND WHICH THE CIRCUIT COURT OF APPEALS, UNDER ITS OWN RULING, WAS NOT AT LIBERTY TO FIND.

The Circuit Court of Appeals misapprehended the contract set up in the pleadings and found by the Referee. It apparently affirmed an altogether different contract. That Court held that the attorneys for the Trustees could employ Mr. Untermyer to assist them, and pay him for his services out of the fees to be received by them as counsel for the Trustees. Said that Court (R. 179-180):

"• • • It is apparent that the parties to this agreement, as found, in retaining the services of the assignor of the plaintiff below, had in mind subserving

the interests of the creditors. It was to be expected that Mr. Untermyer, representing 95% of the unsecured creditors and having been in the litigation from the outset as advisor to the bankrupt, could render substantial services on behalf of the creditors and would be useful to conserving the assets out of which dividends might be paid to them. It was he who retained the defendants below. The defendants below represented no creditors or creditors' committees. They were free to accept assignment as attorneys for the trustee and to represent them. It was not unlawful for them to retain Mr. Untermyer as counsel and thus to obtain competent help in the common effort to bring to the trustees the assets of the estate. *In re Champion Wagon Co.*, 193 Fed. 1001; *In re Baber*, 119 Fed. 520; *In re Abram*, 103 Fed. 272; *In re Stotts*, 93 Fed. 438. Such an agreement is not contrary to public policy. The purpose of Rule V and of the rule of the Supreme Court was not to prevent such employment. It was designed to avoid attorneys actively searching for professional employment in bankruptcy proceedings at their inception and later obtaining their assignment as attorneys for trustees. It was an abuse which sprang from such professional conduct which gave rise to the rule. At no time was an allowance made by the court to Mr. Untermyer, who came within the provisions of Rule V if he applied to the court for compensation. As stated, the finding below is that the defendants below realized that when they were agreeing with Mr. Untermyer for his services, they were consulting counsel for the committee of creditors and knew of his connection in relation to such creditors. His services were accepted; no objection was made to them when tendered."

No fault could be found with this statement of the law. While perhaps not germane to this discussion, yet even such a contract as that found by the Circuit Court of Appeals would not be adjudicated as legal if Weil & Thorp not only employed Mr. Untermyer to assist them, but agreed substantially to abdicate as counsel for the Trustees and substitute Mr. Untermyer in their place, giving him the direction, control and supervision as such counsel; Weil & Thorp to act solely as his representatives, and to represent the interests

of his clients. As stated, even such a contract as commented upon by the Circuit Court of Appeals, with this addition, would not, it is apprehended, be approved by any court.

But the contract sued upon is not the contract discussed by the Circuit Court of Appeals. On the contrary, the contract pleaded and found by the Referee specifically states, not that Weil & Thorp, after their appointment as general counsel to the Trustees, employed Mr. Untermyer, but that Mr. Untermyer employed Weil & Thorp, and agreed with them after their appointment as general counsel to the Trustees that they were to act as his agents and for him and "the interests represented by him," and "under the direction" and "under the general supervision" of Mr. Untermyer. (R. 19, R. 106, Par. 12th.)

As showing this complete domination, control and direction under the alleged contract, it is alleged that said agreement provided that all fees received by Weil & Thorp were to be practically held for the account of Mr. Untermyer, who was to divide them between himself and Weil & Thorp, in his unfettered discretion, in such proportions as he should himself decide. (R. 19, R. 106, Par. 13th, R. 111, Par. 11th.)

The contract specifically set forth in the pleadings and found by the Referee must not be confounded with, and should not be confused with, the contract affirmed by the Circuit Court of Appeals—the not unusual case of counsel representing trustees employing other counsel to assist them, either generally or in some particular matter.

That the contract alleged in the pleadings and found by the Referee is vitally different from, and diametrically opposed to, the contract discussed by the Circuit Court of Appeals, we submit is sufficiently clear from the references heretofore made to those pleadings and findings. It becomes sun-clear and is placed beyond peradventure if those findings are read and interpreted, as they properly may be, in the light of the Referee's opinion (R. 48), to which the attention of this Court is respectfully invited for that purpose.

In that opinion the Referee first observes that the evidence of the agreement consisted of conversations between

Mr. Untermyer and Mr. Weil, and of subsequent correspondence between Mr. Untermyer and his associate, Mr. Wickwire, on the one hand, and Mr. Weil on the other hand (R. 52). He then reviews the conversations between Mr. Untermyer and Mr. Weil from the time that the former, acting in behalf of the Creditors' Committee, first employed Mr. Weil to file a petition in bankruptcy, to obtain an adjudication, and to do whatever might seem necessary in the bankruptcy proceedings to hold the estate together, until the time that Weil & Thorp were appointed chief counsel to the Trustees, *and he comes to the conclusion that those conversations evidenced no agreement or arrangement affecting any allowances that might be made to the petitioners as counsel to the Trustees* (R. 53-57).

The Referee finds the alleged contract, not on these conversations, but solely upon the subsequent correspondence. The grievous error of the Referee was in failing to limit this correspondence to the agreement for division of fees in the Frick sale, an agreement frankly made upon the consummation of the Frick sale in recognition of Mr. Untermyer's services in negotiating and all but consummating that sale prior to the bankruptcy, and which agreement was frankly disclosed to the Court in a joint petition and application for those fees, made in the name of Mr. Untermyer as well as in the names of Petitioners here and other participating counsel. (R. 58, 65, 95-96, Defendants' Proposed Findings 17, 18 and 20, as found by the Referee.) We take the findings, as perforce we must, as they are.

The Referee's view of the nature of the agreement is confirmed, if further confirmation were necessary, by his rulings upon the proposed findings submitted by the Petitioners. He refused to find that (R. 95, Defendants' Proposed Finding 15):

> "Upon the designation of the defendants as general counsel to the Trustees as aforesaid, the employment of the defendants by the said Untermyer to act under his direction for the said Creditors' Committee came to an end and terminated, and said defendants did not undertake thereafter in any manner to act for said Creditors' Committee."

and by inevitable inference he therefore found that upon the designation of the Petitioners as general counsel to the Trustees, *the employment of the Petitioners by Mr. Untermyer, to act under the latter's direction for the Creditors' Committee, continued the same as theretofore, and that the Petitioners undertook, after that appointment as well as before it, to act for the Creditors' Committee.*

The Referee further refused to find at the request of the Petitioners that (R. 95, Defendants' Proposed Finding 16):

> "At the time of the designation of the defendants as general counsel to the Trustees as aforesaid, there was no agreement or understanding between the said Untermyer and the defendants, express or implied, that the defendants were to be so designated as general counsel to the Trustees, nor was there at said time any agreement or understanding between them, express or implied, that the defendants, while general counsel to the Trustees, would act under the supervision or direction of the said Untermyer, nor was there at said time any agreement or understanding between them, express or implied, that the defendants would pay over to the said Untermyer any part of the fees to be allowed and paid to them as such general counsel."

and again by inevitable inference he therefore found that when the Petitioners were designated as general counsel to the Trustees, *there was an agreement or understanding, express or implied, between Mr. Untermyer and the Petitioners, that the Petitioners were to be so designated as general counsel to the Trustees, and that the Petitioners, while general counsel to the Trustees, and owing fealty and allegiance to them, would act under the supervision and direction of Mr. Untermyer.*

It is obvious that the Referee found that the Petitioners, though nominally designated by the Trustees as their counsel, and confirmed as such by the Court, were in reality appointed by Mr. Untermyer under an agreement whereby they acted as his employees and agents, serving him and the creditors represented by him, under his direction, supervision and control, subject to his orders, and so completely under

his domination that they were to account to him for whatever allowances might be made to them as general counsel by the Court, and he was then to exercise the prerogative of allotting to them such share of those allowances as he might see fit. Just as obviously, the agreement as found by the Referee is at the opposite pole from the agreement discussed by the Circuit Court of Appeals, whereby general counsel to the Trustees may call in the aid of an outside and qualified attorney to assist them either in a particular matter or generally.

The contract so pleaded by the plaintiff and found by the Referee was the only contract before the Circuit Court of Appeals and upon which it was required to or could pass judgment. It was not at liberty by its own ruling to make its own findings, even if so inclined. That Court delimited its jurisdiction when it said (R. 175, at 177):

> "No bill of exceptions was filed and the case is here for review on the judgment roll only. * * * On motion, the bill of exceptions was stricken out because it was not served in time. * * * On this review we are at liberty to examine the complaint, answer, findings below and the judgment entered thereon * * *. Nor are the findings of fact a subject for our review."

POINT II.

DEFENDANTS IN THE COURT BELOW WERE NOT ESTOPPED TO PLEAD AND RELY UPON, IN BAR OF THE ACTION, THE ILLEGALITY OF THE CONTRACT PLEADED BY THE PLAINTIFF BELOW AND WHICH WAS FOUND BY THE REFEREE TO HAVE BEEN MADE.

Under ordinary circumstances one of two parties to a contract might be estopped from pleading his own wrongdoing. Such is not the case, however, where the defense is that the contract on which recovery is sought is contrary to public policy or a fraud upon the court. If two parties enter into a contract void *per se*, because contrary to public policy,

neither party thereto is estopped from raising that question. The following cases illustrate this principle:

Roberts vs. Cross, 266 Fed., 296, 301 (C. C. A., N. Y.):

> "The courts do not aid the parties to illegal agreements. If any principle of law is settled it is that a party to an illegal undertaking can not come into a court either of law or equity and ask to have his illegal contract carried out. *Ex dolo malo non oritur actio*, and *in pari delicto potior est conditio defendentis*. It makes no difference whether the contract has been executed, or remains still executory. The defense of illegality may be set up, not as a protection to defendant, but as a disability in the plaintiff. It was said by Lord Mansfield in *Holman vs. Johnson*, 1 Cowper, 341, 343:
>
> > "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex *turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

Among the cases cited in the opinion of the court is *Bereaux vs. Winchester Repeating Arms Co.*, 242 U. S., 191, 206, 207, 208, where this court said:

> "The position of the plaintiff that the illegality of the contract in suit can not be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel * * * [In the objection of illegality] was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law * * * It could not be overcome by defects of pleading, nor indeed,

could it by the defendant's waiver, if we may suppose that in such a matter it would be allowed."

These authorities answer the argument of the Referee that the petitioners, as parties to the contract, can not be heard to urge illegality of the contract in suit as being contrary to public policy.

"The defense of illegality may be set up, not as a protection to defendant, but as a disability to the plaintiff."

Roberts vs. Crane, supra.

The petitioners, if it were necessary in this case, would go even further, and contend that any court, regardless of the action of the parties, when the fact appeared that a contract in controversy in any suit before it was contrary to public policy, or involved a fraud upon the court, or tended to contaminate the streams of justice in its administration by the courts, would refuse its aid to the party seeking to enforce such a contract, and this, when necessary, upon its own initiative, on its own motion, whether or not that objection had been raised by either party to the controversy. Justice has been represented as holding in one hand the scales in unpoising balance, and in the other a sword; but of what use is the sword if she can not use it to defend herself against the assaults of those who would rob her of her virtue?

POINT III.

THE AGREEMENT ALLEGED IN THE COMPLAINT AND AMENDED COMPLAINT, AND PROVED BY THE EVIDENCE, WAS VAGUE, INDEFINITE AND UNCERTAIN, AND THEREFORE UNENFORCEABLE.

By the agreement as pleaded and found, Mr. Untermyer was constituted the sole judge as to the manner in which the allowances made to Wall & Thorp, as attorneys for the Trustee in Bankruptcy, should be apportioned between

them and himself. There is no finding in the record that Mr. Untermyer's determination that sixty per cent. of such allowances might be retained by Weil & Thorp and that forty per cent. thereof should be paid to him, was a fair and equitable distribution. There is no finding that the services rendered by Mr. Untermyer and his firm justified a compensation to them of forty per cent. of such allowances. As far as appears from the record, Mr. Untermyer's determination was arbitrary and unreasonable. The Circuit Court of Appeals, in sustaining the agreement, said (R. 182):

> "Allowing Mr. Untermyer to determine what was fair and equitable did not make the agreement vague or indefinite. His judgment was to prevail, but it could not be arbitrary or capricious; it was to be fair and equitable."

There is no finding, however, in this record, that the determination of Mr. Untermyer was fair and equitable. On the contrary, the Referee declined to find this, when requested by the plaintiff in the District Court below. The Referee's finding implies the contrary.

The plaintiff in the District Court below, in his proposed Thirteenth Finding of Fact, asked the Referee to find that the determination was made in good faith and was fair and reasonable, and that the division was in all respects reasonable and equitable and commensurate with the relative services rendered by Weil & Thorp and by Mr. Untermyer and his firm, but the Referee specifically refused so to find. The proposed Thirteenth Finding and the Finding itself are as follows (R. [illegible]):

> "13. On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 29, 1930, the plaintiff's assignee on or about November 15, 1930, pursuant to the aforesaid agreement [and after giving due consideration to the nature and character of the services rendered by the defendants and by himself and by the firm of Guggenheimer, Untermyer & Marshall, acting for him, in the aforesaid bankruptcy proceedings] determined [in good faith that a fair and reasonable] division of the sum of $117,650.00

theretofore received by the defendants as aforesaid, was that the defendants should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision, [which were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid].

Found omitting portions in brackets which are not found. A. W."

It is difficult to understand, therefore, upon what evidence or findings the Circuit Court of Appeals arrived at the conclusion that the determination made by Mr. Untermyer was fair and equitable, as no such finding by the Referee had been made; so that, upon the statement of the law made by said Court the contract should have been declared unenforceable.

The courts of New York, where this alleged agreement is claimed to have been made, and where this action was brought, have held that agreements of the kind pleaded and found herein are vague, indefinite and unenforceable.

Varney vs. Ditmars, 217 N. Y., 223;
United Press vs. New York Press Co., 164 N.Y., 406;
Barker vs. O'Grady, 163 N. Y. Supp., 594;
McDonald vs. Acker, Merrall & Condit Co., 192 App. Div., 123;
Canet vs. Smith, 173 App. Div., 241;
Featherstone vs. Fowler, 174 App. Div., 452;
Bluemmer vs. Garvin, 120 App. Div., 29.

There is no general rule applicable alike to all cases. Each case stands upon its own peculiar facts. The contract in controversy here would seem to come within the prohibited class. But there is no doubt, under any and all of the decisions, that it must be shown that the decision by any party authorized to decide must not be capricious or arbitrary, but must be reasonable and equitable, and unless those facts appear then the particular case stands as if no distribution had been made or attempted. Wherefore, under the findings

of the Referee, the plaintiff has not shown his right to recover.

For the foregoing reasons Petitioners respectfully submit that the decision of the United States Circuit Court of Appeals for the Second Circuit (S. D., N. Y.), rendered December 19, 1927, affirming a judgment of the District Court of the United States for the Southern District of New York, entered by that Court on March 15, 1926, against Petitioners and in favor of Respondent, should be reversed, and that said District Court should be directed, upon the record before this Court, to enter judgment in favor of Petitioners, with proper costs.

Respectfully submitted,

A. Leo. Weil,
In Propria Persona, and as Counsel for Petitioners.

J. G. Milburn, Jr.,
Of Carter, Ledyard & Milburn,

Louis Salant,
Of Stein & Salant,
Of Counsel.

Office Supreme Court, U. S.
FILED
FEB 28 1928
WILLIAM R. STANSBURY, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. [redacted] 59

A. LEO. WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. HEARY, RESPONDENT.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION TO THIS COURT FOR CERTIORARI.

A. LEO. WEIL,
In Propria Persona and as Counsel for Petitioners.

(33,188)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 736.

A. LEO. WEIL AND CHARLES M. THORP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WEIL & THORP, PETITIONERS,

vs.

EDWARD M. NEARY, RESPONDENT.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION TO THIS COURT FOR CERTIORARI.

I.

How Far Is the Determination of the Referee Reviewable?

Respondent, pages 8 to 12, inclusive, argues that the agreement of reference made the Referee an arbitrator, "whose determination is not reviewable."

Motion to dismiss the appeal on this ground was made in the Circuit Court of Appeals. Said that Court:

> "* * * The application to dismiss is now renewed and is denied. On this review we are at

liberty to examine the complaint, answer, findings below and the judgment entered thereon. No stipulation was signed waiving a jury as provided by Section 649 of the Revised Statutes. Therefore, by virtue of Sec. 700 of the Revised Statutes, the defendant below is not accorded a right to review the rulings on the law of the court, during the progress of the trial of the cause. Nor are the findings of fact a subject for our review. *Fleischmann Co. vs. United States*, 270 U. S., 349; *Duigan vs. United States*, 274 U. S., 195; *Law vs. United States*, 266 U. S., 494. In the *Duigan case, supra*, in referring to Secs. 649 and 700 of the Revised Statutes, the court, referring to Sec. 649, said:

> "Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment."
>
> (Opinion, Circuit Court of Appeals, Transcript of Record, p. 265.)

It will be observed that that Court held, as this Court had decided, that the Court on review can decide, as a matter of law, if the wrong judgment was entered on "the complaint, answer, and findings below."

This is the sole question submitted to this Court by these petitioners in their application for writ of *certiorari*.

II.

The Contract According to Plaintiff's Own Formal and Deliberate Statement.

Respondent states, page 2 of his brief: "The petition does not set forth the findings of the Referee, but consists of a statement largely garbled," and then proceeds to quote (pages 3 to 7, inclusive, of his brief) from the Referee's findings of fact.

The Referee found that Mr. Untermyer and Guggenheimer, Untermyer & Marshall rendered certain services to this estate. By so doing they did nothing more than was required of them, as attorneys for the Creditors' Committee, representing a large majority of the creditors.

Petitioners, in their petition, pages 7 to 13, set forth, in the words of the complaint, the contract on which the suit was brought by plaintiff, and on which the same was tried before the Referee. This contract is set forth in the petition for writ of *certiorari* verbatim in the words of the complaint and amended complaint filed by the plaintiff himself in the court below. This contract, thus stated, must control. The Referee was bound thereby. He stated (R., folio 697, p. 2324):

> "The Referee has come to the conclusion that a contract substantially as alleged by the plaintiff did exist."
>
> (Transcript of Record, p. 86.)

It would serve no useful purpose to discuss different contracts that might be assumed from other findings made by the Referee. If the contract specifically set up

by plaintiff himself, in the complaint and amended complaint, on which this suit was tried, and under which the evidence was introduced, and which the Referee found was made, is contrary to public policy, illegal and void, the plaintiff can not recover. This contract is then stated in paragraph 11, page 15, of the petition for writ of *certiorari* to this Court:

> "11. Your petitioners thus have shown that Mr. Untermyer, although not appointed by the trustees as counsel, nor ratified nor confirmed by the court, as by Rule 5 of said court required, by his own allegations entered into an agreement with Weil & Thorp, as general counsel of the trustees, whereby said duly appointed counsel were required to proceed 'under the general supervision of plaintiff's assignee' (R., folios 21, 109, pp. 7, 33; Appendix, pp. 3, 23, —), were required to act 'for plaintiff's assignee and the interests represented by him' (R., folio 94, p. 32; Appendix, p. 22), and were required to pay to Mr. Untermyer such part of the fees allowed by the court in bankruptcy as Mr. Untermyer himself should demand."

It is wholly immaterial that from other findings of the Referee another or different contract could be assumed, which might or might not be so clearly contrary to public policy, illegal and void, and which a Court, depending upon the degree of its sensitiveness to attacks upon the administration of justice, might or might not condemn.

Respectfully submitted,

A. LEO WEIL,
In Propria Persona and as
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 59

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of WEIL & THORP, *Petitioners*,

vs.

EDWARD M. NEARY, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENT

This Brief in Reply will be confined to matters strictly in reply. In striving for brevity, effectiveness may be sacrificed at times by failure to quote from the record and from the authorities, but instead merely referring thereto.

Bottom of page 1, Respondent's brief, he states:

> "The Referee rendered decision in favor of Respondent, his findings of fact and conclusions of law being set forth in full at pages 2 to 6 *infra*."

No conclusions of law at all are set forth. Page after page of findings, both of fact and of law, in answer to the requests for such findings by both Petitioners and Respondent, are not set forth. Many of these findings, not so set forth, are referred to in the argument and quoted in other portions of the brief of Respondent.

Top of page 2, Respondent's brief, in italics, is the statement:

> "No bill of exceptions was allowed, signed or filed."

This immediately followed the sentence (bottom page 1):

> "A motion was made for the confirmation of this report before Judge Goddard in the United States District Court for the Southern District of New York and resulted in a decision affirming the report, and thereafter judgment was rendered in conformity therewith."

Over thirty pages of exceptions (R. 114-144) were taken. The order of Judge Goddard granting motion to confirm (R. 144-145) states:

> "Now on reading and filing the notice of motion to confirm the said report and the judgment thereon * * * and the defendants' exceptions to the Referee's opinion as submitted prior to the rendition of his report, * * * the defendants' exceptions to the report of the Referee, to his allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, and to his refusals to find the proposed findings of fact and conclusions of law submitted by the defendants, * * * it is ordered," etc.

The opinion of the Circuit Court of Appeals (R. 175 at 177) shows that a bill of exceptions had been filed by defendants but "on motion the bill of exceptions was stricken out because not served in time."

This same statement about no bill of exceptions having been filed is repeated several times in the brief of Respondent. This Court is warned against being misled by these statements into assuming that defendants acquiesced in these findings of fact and of law. The only reason why the bill of exceptions was not considered and passed upon by the District Court was that the judgment, under the practice of that Court, was entered on the Referee's report *pro forma*, and the reason why the bill of exceptions was not insisted upon and argued in the Circuit Court of Appeals was that on motion of the Respondent this bill of exceptions was stricken out because it had not been served in time.

At the bottom of page 6 of the brief of Respondent is the statement:

> "In the presentation of the Respondent's argument it will be contended:
>
> (1) That the stipulation and order on which the reference to Mr. Wardwell was based made him an arbitrator whose determination is not reviewable.
>
> (2) In the event that this proposition is not sustained we next contend that if in the state of the record there is anything that may be reviewed, it must be limited to a consideration of the proposition as to whether the findings contained in the report of the Referee justify the conclusions of law awarding judgment."

Then, under Point I, pages 7 to 20, inclusive, there are cited a very large number of cases, which upon care-

ful analysis could be shown do not sustain the contention of Respondent that the reference made Mr. Wardwell a common-law arbitrator, the proceedings non-judicial, and that nothing could be reviewed, not even whether the pleadings sustained the judgment.

This same question was raised before this Court on the application for certiorari, and in the Circuit Court of Appeals, and in both courts Respondent made elaborate arguments thereon, and was overruled in both courts.

The answer to these contentions, argued again at great length in the Brief for Respondent, covering over forty pages, can be simplified by dividing the answer into three propositions, and by showing that in the state of the record Petitioners are not interested in the first or the second of these answers, but only in the third. These propositions are as follows:

First. It has been held by many courts that a written stipulation, such as that signed by the parties in this case, "agreeing that the trial of this cause be and the same hereby is referred to Allen Wardwell as Referee to hear, try and determine the same with all the powers to act and rule upon said trial possessed by the court," meets the requirements of Section 649 R. S. (U. S. Code, Title 28, Sec. 773), and is a waiver in writing and permits review under Section 700 R. S. (U. S. Code, Title 28, Sec. 875), that being the inevitable and necessary effect of such a stipulation, even though the words "trial by jury being hereby waived" are omitted, and that the agreement could have had no other purpose or intent than such waiver.

Baugher vs. Ins. Co., 103 U. S. 90 (1880).
Ch. J. Waite.

United States vs. Harris, 106 U. S., 629 (1882). Woods, J.

Bond vs. Dustin, 112 U. S., 604 (1884). Gray, J.

Bamberger vs. Terry, 103 U. S., 40 (1880). Ch. J. Waite.

Supervisors vs. Kennicott, 103 U. S., 554 (1880). Ch. J. Waite.

City of Cleveland vs. Walsh Constr. Co., 279 Fed., 57 (1922), C. C. A., 6th Circ.

Second. Where a jury trial has not been waived in accordance with the provisions of the Act of Congress, nevertheless, the court, on review, can consider the questions of law presented by the record; that is, the process, pleadings and judgment, *and whether or not the special findings of the referee or arbitrator are sufficient to sustain the judgment.*

David Lupton's Sons vs. Automobile Club of America, 225 U. S., 489 (1912). Mr. Justice Hughes.

Shipman vs. Straitsville Mining Co., 158 U. S., 356 (1895). Mr. Justice Brown.

Paine vs. Central Vt. R. R. Co., 118 U. S., 152 (1886).

Andes vs. Slauson, 130 U. S., 435 (1889). Mr. Justice Gray.

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Fifth Nat. Bank of City of New York vs. Luttle, 250 Fed., 361 (1918), C. C. A., 2nd Circ.

Demotte vs. Whybrow, 263 Fed., 366 (1920). (C. C. A., 2nd Circ.)

Steger vs. Orth, 258 Fed., 619 (1919). (C. C. A., 2nd Circ.)

J. G. White & Co. vs. Ball Engineering Co., 223 Fed., 618 (1915). (C. C. A., 2nd Circ.)

Delaware, L. & W. R. Co. vs. Caboni, 223 Fed., 631 (1915). (C. C. A., 2nd Circ.)

Municipal Excavator Co. vs. Siedhoff, 15 Fed., (2nd) 10 (1926).

Edwards vs. La Dow, 230 Fed., 378 (1916).

Iroustam vs. All Russian, etc., Societies, 270 Fed., 460 (1920).

Ford vs. U. S., 260 Fed., 657 (1919).

This proposition has been sustained by numerous authorities, some of which have been cited, and is apparently conceded by Respondent in his brief, top of page 7, which states the review "must be limited to a consideration of the proposition as to *whether the findings contained in the report of the referee justify the conclusions of law awarding judgment*," to which proposition he cites many cases.

Third. Where a jury trial has not been waived, in accordance with Secs. 649 and 700 R. S. (U. S. Code, Title 28, Secs. 773 and 875), the power of the court to review is "limited to a consideration of such questions of law as may have been presented by the record proper *independently of the special finding*, such as whether the pleadings were sufficient to support the judgment."

When waiver of jury is not in writing in accordance with Secs. 649 and 700 R. S. (U. S. Code, Title 28, Secs. 773 and 875), nevertheless appellate courts may review errors arising on process, pleadings and judgment.

Flanders vs. Tweed, 9 Wall., 425 (1869). Nelson, J.

Bond vs. Dustin, 112 U. S., 604 (1884). Gray, J.

Commissioners of Road Improvements District No. 2 vs. St. Louis S. W. Ry. Co., 257 U. S., 547. Taft, C. J.

Spalding vs. Manasse, 131 U. S., 65 (1889).

Twist vs. Prairie Oil & Gas Co., 274 U. S., 684 (1926). Brandeis, J.

Campbell vs. U. S., 224 U. S., 99 (1912). Van Devanter, J.

Campbell vs. Boyreau, 21 How., 223 (1858).

Fleishman Constr. Co. vs. U. S., 270 U. S., 349 (1925). Sanford, J.

City of Cleveland vs. Walsh Constr. Co., 279 Fed., 57 (1922). C. C. A., 6th Circ.

Municipal Excavator Co. vs. Siedhoff, 15 Fed., (2d), 10 (1926).

J. G. White & Co. vs. Ball Engineering Co., 223 Fed., 618. (C. C. A., 2nd Circ. [Conn.])

Rush vs. Newman, 58 Fed., 158 (1893).

Noone vs. Sinner, 24 Fed. (2d), 960 (1928).

Ladd & Tilton Bank vs. Lewis A. Hicks Co., 218 Fed., 310 (1914).

Ford vs. U. S., 260 Fed., 657 (1919).

Bouldin vs. Alto Mines Co., 299 Fed., 301 (1924).

Graver Corp. vs. Hercules Gasoline Co., 16 Fed. (2d), 459 (1927).

United States vs. McGovern, 299 Fed., 302 (1924).

Erkel vs. U. S., 169 Fed., 623 (1909).

James Dickinson Farm Mortgage Co. vs. Scimer, 12 Fed., (2d), 772.

Illinois Surety Co. vs. U. S., 229 Fed., 527 (1916).

There is a conflict of authority as to whether the written reference alone, without the specific waiver of trial by jury, is a sufficient waiver of the trial by jury under the Acts of Congress to make Section 700 R. S. (U. S. Code, Title 28, Sec. 875) applicable. The weight of authority and of reason and logic would seem to be that such waiver of trial by jury was implied, as otherwise the written reference would be ineffectual, and such waiver of trial by jury must have been intended by the parties. But Petitioners will not argue this proposition, for the reasons hereinafter explained.

In answer to the contention of Respondent that the Referee in this case was an arbitrator under the common law and his findings cannot be reviewed and on our second proposition it must be noted: This case was brought in the State court and removed to the Federal court. The pleadings were filed in court. Then the submission was made by stipulation to Mr. Ward well "as referee to hear, try and determine the same with all the powers to act and rule upon said trial possessed by the court."

There were filed in court:

(a) The Referee's opinion;

(b) Defendants' exceptions to Referee's proposed report;

(c) Defendants' proposed findings of fact and conclusions of law and Referee's answers thereto;

(d) Plaintiff's proposed findings of fact and conclusions of law and Referee's answers thereto;

(e) Report of Referee, with Referee's findings of fact and conclusions of law; and

(f) Defendants' exceptions.

Thereupon the Court made an order (R. 144) confirming the report, and, in granting the motion to confirm said report and for judgment in accordance therewith, recited that the motion was brought on for hearing before the court, and upon reading,—"the report of the Referee, dated January 13, 1926, the opinion rendered by him, the pleadings, including the amended pleadings herein, and all of the proceedings theretofore had in this case in support of the motion, and the defendants having submitted the order removing this case from the Supreme Court of the State of New York to this Court, the order substituting Messrs. Stein & Salant as attorneys for the defendants, the stenographer's minutes of the testimony taken before the Referee and the exhibits offered in evidence on the hearing before him, the defendants' exceptions to the Referee's opinion as submitted prior to the rendition of his report, the request made to the Referee by the respective parties to pass upon proposed findings of fact and conclusions of law and the findings made thereon, the defendants' exceptions to the report of the Referee, to his allowance of the proposed findings of fact and conclusions of law submitted by the plaintiff, and to his refusal to find the proposed findings of fact and conclusions of law submitted by the defendants, and after hearing Louis Marshall, Esq., of counsel for the plaintiff, in support of the said motion, and Louis Salant, Esq., of counsel for the defendants, in opposition thereto, upon motion of Guggenheimer, Untermyer & Marshall, the attorneys for the plaintiff, it is ordered, that said motion to confirm the report of the referee be and the same is in all respects granted and that a judgment be entered herein in conformity with the said report in favor of the plaintiff and as against the defendants for the sum of $57,064, with interest thereon from November 15, 1920,

and for the costs and disbursements of this action, including the Referee's fees and stenographer's minutes."

By these proceedings the court adopted the report and findings of the Referee, confirmed the same as its own action and entered judgment thereon, as the action of the court.

This is a sufficient answer to the contention of the Respondent that this was a common-law arbitration, a non-judicial proceeding, of which no review could be had of any kind or character.

There is still another answer to this contention of the Respondent, namely:

THE RULE OF REFERENCE IN THIS CASE WAS HAD UNDER THE NEW YORK CODE (CIVIL PRACTICE ACT, SECTIONS 461-471), AND THE PRACTICE UNDER THAT ACT WAS FOLLOWED IN EVERY PARTICULAR.

The right of the Federal Court to make a reference under the State practice has long been recognized by this Court, the New York Federal Courts, and every other Federal Court where such State practice prevails, it being held to be strictly within the Conformity Acts (Sec. 914 R. S.; U. S. Code, Title 28, Sec. 724) of Congress.

Newcomb vs. Wood, 97 U. S., 581 (1878), at page 583.

David Lupton's Sons vs. Automobile Club of America, 225 U. S., 489 (1912). Mr. Justice Hughes.

Shipman vs. Straitsville Mining Co., 158 U. S., 356 (1895), at page 361. Mr. Justice Brown.

Parker vs. Ogdensburgh & L. C. R. Co., 79 Fed., 817 (C. C. A., 2nd Circ.).

Fifth Nat. Bank of City of New York vs. Lyttle, 250 Fed., 316 (1918).

City of Cleveland vs. Walsh Construction Co., 279 Fed., 57 (1912). (C. C. A., 6th Circ.)

DeMotte vs. Whybrow, 263 Fed., 366 (1920). (C. C. A., 2nd Circ.)

In this case Rogers, J., at page 367 stated:

"The facts found by the Referee when confirmed by the Court are treated as the finding of the court."

Steger vs. Orth, 258 Fed., 619 (C. C. A., 2nd Circ.) (1919).

The Court said, (p. 620):

"The action is at law, and as soon as issue was joined the case was referred to a referee 'to hear and determine,' by an order duly entered in the court below on the written consent of the parties. This method of trial needs no explanation to a practitioner under the New York Code of Civil Procedure.

• • • •

The question of adjusting trials before consent referees (common in many States of the Union), not only with R. S. § 914 (Comp. Stat. § 1537), and R. S. §§ 649 and 700 (Comp. Stat. §§ 1587, 1668), but also with the legislation creating and regulating the Circuit Courts of Appeal, is not new. The Fourth Circuit, in *Swift vs. Jones*, 145 Fed., 489, 76 C. C. A., 253, held that such method of trial was or ought to be unknown to the federal court;

but in *Tiernan vs. Chicago Life, etc., Co.*, 214 Fed., 241, 131 C. C. A., 284, and *Philadelphia, etc. Co. vs. Feehheimer*, 220 Fed., 408, 136 C. C. A., 25, Ann. Cas. 1917D, 64, the Eighth and Sixth Circuits substantially held that, if the court approved or adopted the findings and conclusions of the referee, a judgment so obtained and entered was subject to review in the same manner as are judgments founded upon findings by the judge after trial of a common-law action with jury duly waived in writing.

This opinion and the practice resulting therefrom has long obtained in this circuit. * * *."

No conflict of authority exists, that where such proceedings have been had upon a reference, as were taken in this case, which made such proceedings the action of the Court, as to the right of the Court, on review, *to at least consider* the record proper, whether the pleadings are sufficient to support the judgment, without reference to the special findings of the Referee, even if made or adopted by the Court.

In this case, on account of the record, counsel are relieved from any discussion or argument on the first two propositions, and can rely on the third. The action of the Circuit Court of Appeals, on motion of the Respondent, in striking out the bill of exceptions of Petitioners, because it had not been served in time, prevented Petitioners in that court and in this Court from discussing the sufficiency of the evidence to justify the same, or any of the questions of law occurring during the trial.

Therefore, it would serve no useful purpose, so far as Petitioners are concerned, to contend in this Court

that the filing of the written submission to the Referee was a sufficient waiver of trial by jury to comply with the statutes.

The second proposition, as to whether or not the sufficiency of the special findings of the Referee can be considered by this Court on the questions now before this Court, is of no importance to the Petitioners. As will be observed from their argument (Brief for Petitioners, pp. 8-11), they have planted themselves squarely on the pleadings. They have argued that the pleadings are not sufficient to support the judgment, because the alleged contract *as set up in the Complaint*, as interpreted and applied by the Referee, is contrary to public policy, illegal and void.

In the state of the record in this case, the Petitioners plant themselves upon the undisputed proposition, on which there is no conflict of authority whatever, that a court of review may, and on application must, consider all questions of law presented by the record proper, independently of special findings such as whether the pleadings were sufficient to support the judgment.

Where the complaint, upon its face, sets up a contract clearly contrary to public policy, to hold that the court of review is not bound so to hold, is to make of the administration of justice not only "a delusion and a snare" but a shameless pretence.

Suppose, for example, the Complaint had set up a contract made by Mr. Untermyer with Mr. Weil during the late war, and that Mr. Weil had agreed with Mr. Untermyer, as the representative of the German Government, that Mr. Weil was to secure information as

to contracts for war munitions and as to the dates of shipment, and of the sailings of troops, &c., so that Mr. Untermyer could communicate the same to the German Government to enable them to intercept and destroy the same, and Mr. Untermyer had agreed to pay Mr. Weil for his services one-half of what he, Mr. Untermyer, secured from the German Government for obtaining this information, and suit had been brought on this contract by Mr. Weil for the recovery of his half, and this suit had been referred to a Referee who had found such a contract and the amount due to Weil under said contract, and the Court had confirmed and adopted this findings as its action and had accordingly entered judgment for said amount; on review in this Court, would it be contended that this Court would have to sustain that judgment, and would be prevented from denouncing that contract? This illustration is not so fanciful. Contracts such as that in controversy, in the opinion of counsel for Petitioners, are pregnant with nearly if not quite as much evil to our institutions as the traitorous contract above given.

The Complaint sets up that Mr. Untermyer, as the attorney for the Creditors' Committee, agreed with the defendants, as general counsel of the trustees in bankruptcy, that Mr. Untermyer "and the firm of lawyers with which he was associated should collaborate with the defendants *under the direction of the former* [Mr. Untermyer] in the performance of such services and that the defendants were to receive for the services rendered by them out of such allowance as should eventually be made by the court in payment for such services as they should render in said bankruptcy proceedings such sum as plaintiff's assignor [Mr. Untermyer] considered just and equitable, the remainder of the amount so allowed being payable to him." (R. 19.)

"Pursuant to such arrangements the defendants continued to render services in the aforesaid bankruptcy proceedings under the general supervision of plaintiff's assignor [Mr. Untermyer] and with the active aid of the latter and of the firm with which he was associated, for which allowances were made to the defendants" by the court.

There is no allegation in the Complaint that this agreement was brought to the knowledge of the trustees or the court, who made and confirmed the appointment of such counsel to the trustees.

The Referee in his opinion says (R. 71):

> "The only objection that I can see to the contract was that it does not seem in terms to have been made known to the court or to the Referee."
>
> (Referring to the Referee in Bankruptcy.)

Divested of legal phraseology Mr. Untermyer claims that as attorney for creditors, representing interests that were or might become adverse to the bankrupt estate, he made an agreement with the attorneys for trustees in bankruptcy whose selection had been confirmed by the Court, and who therefore as officers of the court, like the trustees or the Referee or the judge himself, owed the highest obligation of trust and allegiance to the estate represented by them, whereby instead of acting solely and uncontrolled and unhampered in the interest of said estate, said attorneys for the trustees were first to collaborate with Mr. Untermyer and then second act under his direction and, then third were to turn over to Mr. Untermyer all allowances made by the court to them for services as attorneys for the trustees, he to give them out of the same such amount as he chose and keep for himself the

rest, and that pursuant to said arrangement the attorneys for the trustees did actually act under the general supervision of Mr. Untermyer and with his active aid and that of his firm and received the allowances out of which he now claims 40 per cent. All this unknown to trustees or Court. This contract as thus set forth is without exceptions, and must regulate the relations of said parties, even if Mr. Untermyer sued the trustees to collect claims for his creditors (which he did) or took other hostile attitude to the trustees or to the estate, whether in the sale of property, contesting of claims represented by him, or howsoever. In other words, however hostile should become the interests represented by Mr. Untermyer to the trustees or the estate this agreement was to continue. If the trustees had made such a contract, or the Referee, the bar, the public, the Courts would have held up their hands in holy horror. Their relation to the estate was no less confidential than these other officers of the court, the trustees' attorneys. Yet a Referee has reported that such a contract was not contrary to public policy and a Court has confirmed that report and entered judgment thereon. It is now argued in this Court that this Court is bound to ratify and confirm this action of Referee and of Court and give the sanction of its authority to such a contract.

The monstrous character of such an agreement and its pregnancy for evil has been discussed in Petitioners' brief, p. 12-14, and 16, 17.

Where this agreement appears in all its shamelessness on the face of the Complaint, as the sole ground for recovery, it would seem a work of supererogation to argue that this Court, on the review of this case, has power to denounce the same as contrary to public policy.

It may occur to the inquiring mind: If this contract set up in the Complaint was so clearly against public policy, why was it not demurred to? The Amended Complaint was not filed until after the trial had ended, after all the testimony had been taken, and was made on the motion of plaintiff to make the Complaint conform to the proofs. It might be imagined as another reason, that defendants were confident that upon the evidence which had been taken a finding would be made that they had never made such a nefarious contract, and that they were reluctant to admit, even for the purposes of a demurrer, that they had ever made such a contract as was set up in the Complaint. In any event, the fact that no demurrer was filed *then* does not prevent this Court *now* from deciding the question.

At the bottom of page 20 of the Brief for Respondent is the statement:

> "The correctness of the Referee's Findings of Fact above quoted *in extenso* can not be challenged. They were made by a lawyer of great ability, vast experience and unquestioned fairness and integrity, than whom there is nobody at our bar possessed of higher ethical standards or a finer conception of professional ethics."

Is this the only reason they can not be challenged? The greatest judges in this and every other country, possessing all of these virtues, have had their findings of fact and decisions challenged. The statement above quoted, without anything in the record to justify it, by an abuse of opportunity was injected into Respondent's brief. Whenever counsel, in argument, to sustain the decision of any court, find it necessary to proclaim the great ability, experience, fairness, integrity, possession of ethical standards and conceptions of professional

ethics of that court, it is only when there is something abnormal, extraordinary and indefensible in that decision, calling for such an explanation and requiring justification otherwise than by argument.

Throughout the brief of Respondent, as on pages 21, 49, etc., the statement is made:

> "The findings of the Referee show that nothing was concealed from the trustees in bankruptcy, for it is found at folio 168, page 111, that the latter 'in selecting the defendants as their counsel realized that they were selecting for the position counsel of the committee of creditors, who were represented by plaintiff's assignor, and knew of the defendants' connection with the plaintiff's assignor in relation to such creditors.'"

This Court must not be misled by such statements. This is an attempt to confuse two periods of time, the first of which was when Petitioners were employed by the Creditors' Committee and represented them under the supervision of Mr. Untermyer, to secure the adjudication in bankruptcy of Mr. Thompson and meanwhile prevent foreclosure of mortgages, sales on judgments, &c. The second period was when this employment had ended and was after the trustees were appointed and Petitioners were selected as their counsel. Under the rule of the Bankruptcy Court they had to certify that they had no further connection with Mr. Untermyer or creditors.

There is no finding by the Referee, and it is not the fact, that either the trustees or the court knew of any connection between Mr. Untermyer and their attorneys, after their appointment as attorneys for the trustees, such as that set up in the alleged contract. The

Referee in his opinion (R. 71), hereinbefore quoted, states the contrary.

On page 24 of the Brief for Respondent, the proposition is made:

> (a) "The burden of proof to show that an agreement is illegal or against public policy rests upon the defendant. The principle *ut res magis valeat quam pereat* applies with full force in such a case."

In support and discussion thereof follow 25 pages of argument and citations.

This burden of proof and application of the legal maxim apply where the invalidity does not appear upon the face of the contract, and where the possible injury to the public showing that it is contrary to public policy depends upon other facts and circumstances (which must be proven) than those disclosed by the contract **itself**. Another exception is where the contract on its face shows that it has a tendency to evilly affect the administration of justice and pollute its streams.

In the first case cited on page 24 of Respondent's brief,—*Dykers vs. Townsend*, 24 N. Y., 57, a case involving the Stock Jobbing Act,—the Court said:

> "*Where a contract is apparently valid upon its face*, the party seeking to impeach it must prove that it was made under such circumstances or for such purpose as to render it void before the defense can be made available."

In all of the cases cited by Respondent the contract was apparently valid upon its face and required proof to show that it was against public policy as al-

leged, and the quotations from the respective courts are explained by these conditions. A brief review of these cases shows this.

Ormes vs. Dauchy, 82 N. Y., 443, concerned a contract to advertise a lottery in other states, where there was nothing to show that lotteries were illegal in such other states.

Richards vs. Weiner Co., 207 N. Y., 59, was an action on a contract by a corporation to purchase its own stock.

Appleton Co. vs. Warbasse, 92 Misc. Reps., 42, was an action to recover expenses incurred in an action of libel.

Oregon Railroad & Nav. Co. vs. Dumas, 181 Fed., 781, was an action to recover damages for failure to supply cars for the transportation of plaintiff's apple crop.

People ex rel. N. Y. C. & H. R. R. Co. vs. Walsh, 211 N. Y., 90, was on a contract between a railroad company and the State to provide for a permanent easement to occupy canal lands for railroad purposes.

Hobbs vs. McLean, 117 U. S., 567, was an action between partners for an accounting, involving a settlement of profits and losses under a contract with the Government.

A number of other cases are cited and quoted from, in none of which did the contract upon its face show that it was contrary to public policy.

On page 30, Brief of Respondent, it is stated, "Petitioners rely on three cases," and the Respondent then

proceeds to discuss these cases and give the facts thereof. By reference to page 15 *et seq.* of Petitioners' brief, it will be found that the cases relied on and cited by Petitioners include four cases decided by the United States Supreme Court and four cases decided by the Supreme Courts of States and one case by the Circuit Court of Appeals. This latter case was taken to the Supreme Court, *Sampliner vs. Motion Picture Co.*, 254 U. S., 233, and reversed upon a question of practice, without any opinion on the citations made in petitioner's brief, and the case was remanded for further proceedings in the District Court in conformity with the opinion of the Supreme Court on the questions of practice alone.

But a proposition so elementary would seem to require the citation of no authorities. The authorities are cited by Petitioners more for the purpose of showing that the law denounces such contracts in order to close the door to temptation, where the general tendency might lead to wrong-doing, even when no wrong was intended or shown.

A discussion from time to time in the Brief of Respondent of the fact that nothing illegal was shown to have been done by Petitioners under this contract, while not relevant to this discussion, may be easily explained by the fact that Petitioners most vehemently denied in their answers that they ever made such a contract or acted under the same.

The statement is made on page 45 of the Brief for Respondent that the Petitioners—

> "likewise had the benefit of the exceptional familiarity with the bankrupt estate, the experience and advice of plaintiff's assignor and of his knowledge

of the negotiations conducted by the Creditors' Committee for the advantageous sale of the bankrupt's assets for the benefit of his creditors. Indeed, it was these negotiations which finally culminated in the conveyance by the trustees of the bankrupt's property to the great advantage of the creditors."

Neither the Creditors' Committee nor Mr. Untermyer found the purchaser, the Piedmont Coal Company, to which the bulk of the bankrupt's estate was sold and conveyed. This was done by the trustees and their attorneys. But even if he had, he was the attorney of the Creditors' Committee, and was paid by them for his services.

But all of this statement in Respondent's brief is outside of the record before this Court, and like other statements heretofore referred to, and many that have not been mentioned, are improperly injected into the Brief for Respondent.

On page 56 of Brief for Respondent, it is stated:

"Petitioners for the first time have raised a question which was not presented in the petition or brief on the application for writ of *certiorari* herein, namely, that the Referee in passing on Respondent's thirteenth request to find (Rec. p. 106) omitted to find those portions of the request which are printed in brackets and that such portions were not found," etc.

It will be found by reference to bottom of page 18 and on page 19 of Petitioners' brief, on the application to the Supreme Court for writ of *certiorari*, that this

question was there squarely and specifically raised and presented.

Respectfully submitted,

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FEB 17 1899

Supreme Court of the United States

October Term, 1897.

No. [redacted] 59

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp,

Petitioners,

against

EDWARD M. NEARY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

LOUIS MARSHALL,
Respondent's Counsel.

The Stock Press, 27 Warren St., N. Y. 'Phone, Warren 1418.

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Supreme Court of the United States

OCTOBER TERM, 1927.

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp, Petitioners, against EDWARD M. NEARY, Respondent.	No. 736.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioners have applied for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit for the review of a judgment of that Court affirming a judgment in favor of the respondent against the petitioners rendered by the United States District Court for the Southern District of New York for $80,991.08 upon the confirmation of the report of Allen Wardwell, Esq., as Referee to hear, try and determine the issues (*Rec., pp.* 215-219, 271).

The opinion of the Circuit Court of Appeals is reported 22 Fed. (2nd) 893.

The petitioner has submitted a voluminous document styled "Appendix" which apparently is merely a copy of the "Transcript of Record."

The trial was a protracted one, the testimony and exhibits covering nearly 2,200 printed pages. No bill of exceptions was allowed, signed or filed.

We contend that, there having been no written waiver of a jury as provided by Sections 649 and 700 of the Revised Statutes, the Referee was an arbitrator whose determination is not reviewable.

At all events, if there is anything to be reviewed, the review will be limited to the consideration of the proposition as to whether the findings contained in the report of the Referee justified the conclusions of law awarding judgment.

Chicago, M. & St. P. Ry. Co. v. Clark, 92 Fed. Rep. 968.

Shipman v. Streatorville Central Mining Co., 178 U. S. 356, 361.

Dooley v. Pease, 180 U. S. 126, 131.

David Lupton's Sons v. Automobile Club, 225 U. S. 489, 494.

Rossler & Haarlacher Chemical Co. v. Standard Silk Dyeing Co., 254 Fed. Rep. 777.

United States v. One Diamond Necklace, 267 Fed. Rep. 696.

Anastasatos v. All Russian etc. Societies, 270 Fed. Rep. 460.

The petition does not set forth the findings of the Referee, but consists of a statement largely garbled. *It totally ignores the Referee's findings, which are controlling.* We are, therefore, constrained to refer to the incontrovertible findings of fact contained in the Referee's report (*Rec., pp.* 165-172) on which is based his conclusion of law

that the defendants (petitioners) are jointly and severally indebted to the plaintiff in the sum of $57,061, with interest from November 15, 1920, and direction for judgment accordingly (*Rec., p.* 172).

The Referee's Findings of Fact.

After showing that the defendants were lawyers engaged in practice at Pittsburgh, Pa., and that Mr. Samuel Untermyer, the plaintiff's (respondent's) assignor, was engaged in the practice of the law in New York City, and that before the commencement of this action he had assigned and transferred to the plaintiff all of his right, title and interest in and to the cause of action set forth in the complaint and amended complaint herein, and that the plaintiff is the owner thereof (*Rec., fols.* 7209, 7210), the Referee found as facts:

> "4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. *The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors*" (*Rec., fols.* 7210, 7211).
>
> "5. On or about January, 1915, such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said es-

tate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and *such assets were conserved principally through the instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00*" (Rec., fols. 7211, 7212).

"6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied *that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclosure of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to reinstate such bankruptcy proceedings.* To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the *protection of the creditors and the conservation of the estate of said Thompson* and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars" (Rec., fols. 7212-7213).

"7. *Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connection with said Thompson, his Estate or his creditors*" (Rec., fol. 7215).

"8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, *the defendants herein acting at the instance of plaintiff's assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson*" (*Rec., fols.* 7215, 7216).

"9. *The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendant's connection with plaintiff's assignor in relation to such creditors*" (*Rec., fol.* 7217).

"10. In the course of the administration of the Estate of the said Thompson, various complications arose which prolonged the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants *and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy*" (*Rec., fol.* 7218).

"11. *Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together perform such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) Dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him.*" (Rec., folo 7219, 7220).

"12. *The said agreement referred to in Finding 11 applied only to fees for services rendered in connection with the preservation of the bankrupt's estate against forced sales by mortgagees, judgment creditors and other lienors and the sale of the properties of the estate and did not apply to fees for services rendered in connection with the general administration of the estate after all of the properties embraced in the estate had been sold or otherwise disposed of.*" (Rec., folo 7221).

"13. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor, and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances were made in such bankruptcy proceedings by the*

District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, *to an aggregate amount received by them for such services of $124,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him*" (*Rec., fols.* 7221-7223).

"14. *On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28th, 1920, the plaintiff's assignor on or about November 17, 1920, pursuant to the aforesaid agreement determined the division of the sum of $124,659.98, theretofore received by the defendants as aforesaid, was that the defendant should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision*" (*Rec., fol.* 7223).

"15. Thereafter the defendants refused to comply with his determination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,064.00 with interest from November 15, 1920" (*Rec., fol.* 7224).

The petition quotes various disconnected passages contained in the Referee's opinion. In *Fleischmann Co. v. United States*, 270 U. S. 349, 355, following other cases, this Court said:

> "In passing on this question we are confined to the findings properly so called and may not look at the referee's opinion or the court's."

See also:

Insurance Co. v. Tweed, 7 Wall. 44, 51.

Dickinson v. Planters Bank, 16 Wall. 250, 257.

British Mining Co. v. Baker Mining Co., 139 U. S. 222.

Bunker Hill & L. Mfg Co. v. Polak, 7 Fed. (2nd) 583, 584;

Isaacs v. De Hon, 11 Fed. (2nd) 943, 944.

Swanson v. Continental Casualty Co., 12 Fed. (2nd) 410.

Thompson-Starrett Co. v. La Belle Iron Works, 17 Fed. (2nd) 536, certiorari denied by this Court, 274 U. S. 748.

POINTS.

I.

The stipulation and order on which the reference herein was based, made the Referee an arbitrator, whose determination is not reviewable.

This cause was tried before Allen Wardwell, Esq., as Referee, under an order

> "that the trial of the action was referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same with all the powers to act and rule upon the said trial possessed by the Court" (*Rec.*, p. 77).

The stipulation on which the order was based, and which was recited in the order, provided

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto

> that the trial of this cause be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court" (*Rec., p.* 78).

It thus clearly appears that the stipulation contains no waiver of a jury as provided by Section 649 of the Revised Statutes. This, we contend, made the trial before the Referee an arbitration.

Section 649 provides:

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, *whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury.* The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

This section is derived from the Act of March 3, 1865, Chapter 86.

Section 700 reads:

> "When an issue of fact in any civil cause in the circuit court is tried and determined by the court without the intervention of a jury according to section 649, *the rulings of the court in the progress of the trial of the cause, and if excepted to at the time and duly presented by a bill of exceptions*, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This section is likewise derived from the Act of March 3, 1865, Chapter 86.

Trials without a jury in actions at law in the District Court are now controlled by the provisions of Sections 649 and 700 of the United States Revised Statutes, formerly applicable solely to the Circuit Courts, which were abolished by Sections 289 and 291 of the Judicial Code and their powers transferred to the District Courts.

Ex parte United States, 226 U. S. 420.
Nashville Interurban Ry. v. Bacauus, 212 Fed. Rep. 634.

Prior to 1912 a jury could not be waived in an action at law in the District Courts and a decision of such a cause tried without a jury was not reviewable in any event.

Campbell v. United States, 224 U. S. 99, 105.
Doty v. Jewett, 19 Fed. Rep. 337, 338.
Eastern Oil Co. v. Holcomb, 212 Fed. Rep. 126.

Under these provisions it has been the long established rule that whenever cases are submitted for trial without a jury, and a stipulation in writing waiving a jury has not been filed with the clerk, as provided in Section 649, the trial, if before a court or before a referee, virtually constitutes an arbitration, and a judge or referee who acts in the absence of such written waiver acts solely as an arbitrator. There is, therefore, nothing here for review.

Campbell v. Boyreau, 21 How. 223.
Flanders v. Tweed, 9 Wall. 425.
Kearney v. Case, 12 Wall. 275.
Swift v. Jones, 145 Fed. Rep. 489.
Ford v. U. S., 200 Fed. Rep. 657.
Dundee Mortgage Co. v. Hughes, 124 U. S. 137.
Roberts v. Benjamin, 124 U. S. 64.
Shipman v. Mining Co., 158 U. S. 361.
Dingman v. United States, 274 U. S. 195.

Fleischmann v. United States, 270 U. S. 349, 355.
Thompson-Starrett Co. v. La Belle Iron Works, 17 Fed. (2nd) 635; certiorari denied, 274 U. S. 748.

In *Duignan v. United States*, 274 U. S. 195, the most recent of these decisions, Mr. Justice Stone clearly stated the rule regarding the waiver of a jury trial:

> "The right to a jury trial may be waived where there is an appearance and participation in the trial without demanding a jury. (*Kearney v. Case*, 12 Wall. 275; *Percgo v. Dodge*, 163 U. S. 160, 166). Section 649 of the Revised Statutes provides that issues of fact may be tried by a court without a jury, *upon written stipulation of the parties*, and that the finding of the court upon the facts shall have the same effect as the verdict of the jury. But this section does not preclude other kinds of waiver (*Kearney v. Case, supra*). *Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment.* **See** *Law v. United States*, 266 U. S. 494, 496; *Cf. Fleischmann Co. v. United States*, 270 U. S. 349, 355, 356."

Even where a trial by jury *has been waived in writing* the appellate court is limited to the sufficiency of the facts found to support the judgment and to rulings excepted to and presented by a bill of exceptions.

Llewellyn v. Electric Reduction Co., 48 Sup. Ct. Rep. 63.
Ingram Day Lumber Co v. Melouth, 48 Sup. Ct. Rep. 153, 154.

In the present case there was neither a written waiver of trial by jury nor a bill of exceptions and the case comes within the rule laid down in *Duignan v. United States* (*supra*).

(2) *An oral waiver of trial by jury does not satisfy the statute. Nothing but a stipulation in writing waiving a jury will suffice.*

Madison County v. Warren, 106 U. S. 622.
Andes v. Slawson, 130 U. S. 435.
Rush v. Newman, 58 Fed. Rep. 158.
Illinois Surety Co. v. United States, 229 Fed. Rep. 327.
William Edwards Co. v. La Due, 230 Fed. Rep. 378.

II.

The petitioners' contention that the contract between them and the respondent's assignor was illegal and violative of public policy is without justification.

(1) In *Steele v. Drummond*, 48 Sup. Ct. Rep. 53, decided November 21, 1927, the principles applicable to the defense that a contract is void as being contrary to public policy were carefully formulated. There it was claimed that a contract for the extension of a railroad was illegal as opposed to public policy because one of the parties agreed to procure the passage of ordinances in a town through which the railway was to run.

It was held: (a) It is only because of the dominant public interest that one who has had the benefit of performance by the other party is permitted to avoid his own obligation on plea that the agreement is illegal. (b) As re-

spects the enforceability of a contract claimed to violate public policy it is a matter of great public concern that freedom of contract be not lightly interfered with. (c) It is only in clear cases that contracts will be held void as against public policy, since the principle must be cautiously applied to guard against confusion and injustice. (d) Detriment to public interest will not be presumed in a contract where nothing sinister or improper is done or contemplated.

In this connection it is proper to note, by way of contrast, the statement in the petition herein (*Petition*, p. 19; *Petitioners' Brief*, p. 4):

> "It is immaterial that the particular contract in controversy, as, for example, that here, is not tainted with a perverted motive."

The decision in *Steele* v. *Drummond* is in line with overwhelming authority which imposes the burden of proof to show that an agreement is illegal or against public policy on the party urging the contention, and applies the principle *ut res magis valeat quam pereat*.

Baltimore & Ohio Ry. Co. v. *Voigt*, 176 U. S. 498, 505.

Valdes v. *Larrinaga*, 233 U. S. 705, 709.

Canal Co. v. *Hill*, 15 Wall. 94.

Hobbs v. *McLean*, 117 U. S. 567.

Oregon R. R. & Nav. Co. v. *Dumas*, 181 Fed. Rep. 781.

Dykers v. *Townsend*, 24 N. Y. 57.

Curtis v. *Gokey*, 68 N. Y. 300.

Ormes v. *Dauchy*, 82 N. Y. 443.

Izvillard v. *Clyde*, 86 N. Y. 384, 387.

Cheesbrough v. *Conover*, 140 N. Y. 382.

Shedlinsky v. *Budweiser Brewing Co.*, 163 N. Y. 439.

Richards v. *Wiener Co.*, 207 N. Y. 59.
People ex rel. N. Y. C. & H. R. R. R. Co. v. *Walsh*, 211 N. Y. 90.

(2) Not only have the petitioners failed to prove an invalid agreement as the basis of this action, but the findings of the Referee show unmistakably that there was no taint of illegality in the arrangement between the parties.

The facts as found show that neither of the parties in their relations, contemplated or actual, was moved by any other idea than that of subserving the interests of the creditors of Thompson. Mr. Untermyer was concerned solely with the welfare of the unsecured creditors. He had been the counsel for a creditors' committee, created eighteen months before the institution of the bankruptcy proceedings, which represented 95 per cent. of all of the unsecured creditors of Thompson and $14,000,000 of claims out of a total of $15,000,000 of unsecured indebtedness. A receiver had been appointed by the Court of Common Pleas of Pennsylvania in an attempt to conserve the assets of Thompson for the benefit of his creditors. The Supreme Court of Pennsylvania having, however, in 1917, decided in *Hodgsett* v. *Thompson*, 258 Pa. St. 85, that under the chancery practice of that State there was no authority for such a receivership, it thereupon became apparent that, in order to prevent the property from being sacrificed and absorbed by the secured creditors, the only hope of protecting the unsecured creditors was by instituting bankruptcy proceedings. Acting, therefore, solely in the interest of these creditors and for the purpose of conserving the assets, Mr. Untermyer whose relations with the petitioners were most cordial, brought these facts to the attention of Mr. Weil and requested him to institute bankruptcy proceedings in the interest of the creditors and to prevent the property of the bankrupt from being dissipated and frittered away, as it would otherwise have

been. He indicated what he regarded to be the limit of compensation which the respondents ought to receive for the services which were then in contemplation. Mr. Weil recognized the fact that this business came to him through Mr. Untermyer and that 95 per cent. of the unsecured creditors of Thompson were represented by the committee for which Mr. Untermyer was counsel. He expressed his readiness to accept for his services in the proceedings which were to be instituted whatever sum Mr. Untermyer would regard as proper. That was fixed at $5,000.

Mr. Weil represented no creditors; his services were not essential to the carrying out of the plan of the creditors' committee. Mr. Untermyer himself might have instituted the bankruptcy proceedings. It was, however, regarded as convenient to have local counsel. It was understood that Mr. Untermyer would collaborate with Mr. Weil, because of the fact that 95 per cent. of the unsecured creditors were represented by him, and that he would studiously follow the proceedings and advise Mr. Weil with regard to them solely in the interest of all the creditors in whose protection he was deeply concerned.

That the trustees were chosen and that Mr. Weil was made one of their counsel, without any action on the part of Mr. Untermyer, negatives the idea of an illegal contract. The Referee expressly found that the affairs of the Thompson estate were very complicated and that Mr. Untermyer was the person most conversant with them from the legal aspect (*Rec., fol.* 7217). It was further found that the trustees in bankruptcy in selecting the petitioners as their counsel, realized that they were selecting for that position counsel of the committee of creditors, which was represented by Mr. Untermyer, and knew of the petitioners' connection with him in relation to such creditors (*Rec., fol.* 7217).

It became evident in the course of the administration of the estate of Thompson that, on account of the com-

plications which had arisen, the period of the administration would be prolonged beyond that contemplated at the time of the institution of the bankruptcy proceedings, and that this rendered it necessary for the petitioners and Mr. Untermyer and the firm of Guggenheimer, Untermyer & Marshall, who acted for the latter, to perform services which exceeded those originally contemplated (*Rec., fol.* 7218).

In recognition of that fact, Mr. Untermyer and the petitioners agreed that they would collaborate by rendering such services as were necessary and proper in the bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt. It was further agreed that the petitioners were to receive for the services so to be rendered by them, out of such allowances as should eventually be made by the Court in payment therefor, such sum as Mr. Untermyer should consider just and equitable, the remainder of the amount so allowed being retained by the petitioners (*Rec., fols.* 7219, 7220).

It is not pretended that the expense to the estate was in any way to be increased or that it was enhanced to the extent of a penny by reason of such arrangement. Whatever compensation the petitioners were to receive was to be for the services actually rendered for the benefit of the estate, and such allowances were made by the Court to the amount of $142,659.98, the Referee finding that "a substantial part of the services for which these allowances were made had been performed by Mr. Untermyer and by Guggenheimer, Untermyer & Marshall acting for him" (*Rec., fol.* 7222).

The Referee further found that the petitioners continued to render services in the bankruptcy proceedings under the general supervision and with the active aid, assistance and collaboration of Mr. Untermyer and of Guggenheimer,

Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor by the trustees in bankruptcy upon the sale of such assets, from which the allowances in question were made (*Rec., fols.* 7221, 7222).

Surely these undisputed facts indicate that "nothing sinister or improper was done or contemplated." The services rendered inured to the benefit of the bankrupt's estate and of his creditors. The co-operation of Mr. Untermyer and of those who acted for him assured the creditors of the benefit of the services of those most conversant with the complicated affairs of the Thompson estate from the legal aspect. There was no secrecy as to this collaboration. The allowances made to the petitioners represented not only their own services, but those of Mr. Untermyer and his associates. It was a unitary service and the compensation allowed was for that service. There was nothing improper on the part of the petitioners, who recognized the value of these services, under the circumstances, to authorize Mr. Untermyer to determine how the amount received should be distributed between those who had rendered the services for which the allowances were made. There was nothing malign in the fact that those who were seeking to conserve the assets of the bankrupt and who represented no interest hostile to that of the general creditors, but were directly concerned in the welfare of 95 per cent. of those creditors, should, to speak colloquially, keep their eye upon the bankruptcy proceedings and render active aid, assistance and collaboration to the petitioners in the effort to conserve the assets for the benefit of the creditors—*a result accomplished by their united efforts.* It is not pretended that anything was done or undertaken to be done which interfered or tended to interfere with the authority of the Court or the action of the trustees. It

is not pretended that either they or any of the creditors made the slightest objection.

Petitioners rely on *Maxsell v. Maiers*, 203 App. Div. 646, aff'd 236 N. Y. 516. An analysis of that decision demonstrates that there is nothing in common between its facts and those now under consideration.

There an involuntary petition in bankruptcy was filed against the Franklin Brewing Company about January 23, 1917. Prior to that date the plaintiff was its attorney, familiar with its affairs and the names of all of its creditors. The complaint alleged:

> "*That thereafter the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of the said bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for said trustees* and to assist the said defendant in the event of his appointment as attorney for said trustees in all matters of litigation which he might be called upon to do by the said *defendant, and said defendant agreed with plaintiff herein that in the event of such appointment as aforesaid as attorney for the said trustees*, that he would pay to the plaintiff herein one third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for the said trustees."

It was further alleged that thereafter "the plaintiff herein used his efforts and assisted in procuring the election and appointment" of certain designated trustees, one of whom was the defendant's son, and that plaintiff urged upon such trustees the appointment of the defendant as their attorney, and that thereafter the defendant was duly elected and appointed attorney for the trustees.

Commenting on these facts, Mr. Justice Young said:

> "Clearly, the purpose of the agreement was to procure the election of certain trustees, *whose primary and controlling qualification was that, when elected, they would appoint defendant their attorney to conduct the litigation of the estate.* * * * The agreement in question, if at all effectual, tested the fitness of the trustees, whose election was to be procured, *not by their qualifications as being men of intelligence, honesty and integrity, who would act solely in the interests of the creditors by whom they were elected, but the paramount and controlling consideration was that such trustees, and only such, would be elected, who would appoint the defendant their attorney. Otherwise, the agreement was meaningless. Plaintiff's compensation for the services to be rendered depended upon the accomplishment of that result. In other words, in order to earn such compensation, he must obtain two things: (1) election of trustees who would appoint defendant their attorney; (2) defendant's appointment by them as such attorney. That was the essence of the contract, and, so far as its real purpose was concerned, nothing else was of the slightest importance.* Persons illiterate, dishonest, open to sinister influences or otherwise, might be elected pursuant to the agreement sued on, and if they fulfilled the requirements of that agreement by appointing defendant their attorney, plaintiff's compensation was earned, or at least the contingency which stood in the way of his obtaining such compensation was removed."

Here, respondent's assignor was not requested to assist the petitioners in the election of trustees for Thompson, or to procure their appointment as attorneys of the trustees; nor was there any purpose or intent on his part to do aught that would interfere with the rights and interests of Thompson's creditors.

(3) Courts will not lightly condemn a contract as contrary to public policy. Such a defense is carefully scrutinized and can only be based on proof susceptible of no other than a malign interpretation.

Hyams v. *Stuart King* (1908), K. B. Div. 696, 710.

Lord Halsbury in *Janson* v. *Driefontain Consolidated Mines, Ltd.*, 1902 App. Cas. 491.

Baron Parke in *Egerton* v. *Lord Brownlow*, 4 H. L. Cas. 123.

(4) There was nothing illegal in the agreement between the respondent's assignor and the petitioners, whereby it was left to his determination as to how the compensation allowed by the Court, for the services rendered, was to be divided.

Well, as the appointee of the trustees, represented the creditors of the bankrupt, the trustees themselves acting for the creditors, for whose benefit the proceedings had been instituted.

In re Gordon Supply & Mfg. Co., 129 Fed. Rep. 622.

In re Hanson, 156 Fed. Rep. 717.

It goes without saying that a trustee in bankruptcy has the right to employ counsel where legal advice is necessary for the performance of his duties.

In re Stotts, 93 Fed. Rep. 438.

In re Abram, 103 Fed. Rep. 272.

In re Baber, 119 Fed. Rep. 520.

In re Champion Wagon Co., 193 Fed. Rep. 1004.

1 *Remington on Bankruptcy* (2nd Ed.), pp. 714-721.

Indeed, it has been held to be error for a referee in bankruptcy to permit the creditors by a majority vote to select the attorney for the trustee, the right to make such selection being in him, subject only to control by the Court.

In re Columbia Iron Works, 142 Fed. Rep. 234.

The relations between trustee and counsel are merely those of client and attorney.

In re Abram, 103 Fed. Rep. 273.

There is no statutory restriction upon the power of the trustees to employ counsel, the generally accepted doctrine being, however, that the trustee shall not as a rule employ as counsel those who have represented or are representing adverse interests, as, for example, the bankrupt or his family.

The general rule with respect to the payment of fees to the attorneys for the trustee was laid down in *In re Byerly*, 128 Fed. Rep. 637, where it was said:

> "There is no direct provision in the Bankruptcy Act for the payment of the fees of attorneys employed by the trustee, but they come in as part of the administration of the estate like other necessary expenses."

To the same effect, see:

Page v. Rogers, 149 Fed. Rep. 194; 211 U. S. 575, 581.

In re Smith, 203 Fed. Rep. 369.

In the absence of any finding showing adverseness of interest, it will not be presumed that the interests of part of the unsecured creditors are adverse to the other unsecured creditors.

In this connection, attention is directed to the 9th finding contained in the Referee's report (Rec., fol. 7217) and to the further fact that with this knowledge the allowances in question were made to the defendants.

The petitioners claim that Rule V of the Rules of the United States District Court for the Western District of Pennsylvania forbade the arrangement made between the petitioners and respondent's assignor.

That rule, however, has no possible relation to the subject. It merely provides that unless specially authorized by the Court, receivers and trustees in bankruptcy shall not retain *as their attorney*, the attorney of the bankrupt, of the petitioning creditors, of the persons applying for the appointment of a receiver, or of any creditor, and that the trustees shall not retain *as their attorney*, any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies.

It is not claimed that the respondent's assignor was appointed or retained as attorney by the trustees, or that he obtained proxies or voted upon the election of the trustees, or that he was the attorney for persons holding such proxies. Mr. Weil was retained as attorney by the trustees and his designation was undoubtedly authorized by the Court, for it made allowances to him for the services rendered to the trustees in the bankrupt estate. There is not a word in the rule which in any way restricted him in the choice of those who might assist him professionally and in an advisory capacity in the performance of his duties. It would be farcical to say that he was bound to forego the collaboration of the person most conversant with the conditions affecting the rights and interests of the creditors, or to suppose for a moment that the trustees or the Court would ignore the advantages flowing from such co-operation and watchfulness.

The General Order in Bankruptcy, promulgated on April 13, 1925 (267 U. S. 614, 615), relating to the compensation of attorneys, receivers and trustees, was referred to by petitioners in the Court below. It is, of course, not retroactive. Nor has it any bearing here. It merely provided that *every attorney* seeking an allowance of compensation *from a bankrupt estate* for services rendered, shall file with the Referee a petition under oath, setting forth certain facts. The petition "is to be accompanied by an affidavit of the applicant, stating that no agreement had been made directly or indirectly and that no understanding exists for a division of fees *between the applicant and the receiver, the trustees, the bankrupt, or the attorney of any of them.*" In the absence of such petition and affidavit no allowance of compensation is to be made.

The respondent's assignor was not the receiver, or the trustee, or the attorney for the receiver or the trustee or the bankrupt. Consequently a transaction such as that now under review does not come within the scope of the General Order. It follows that there is nothing either in the Bankruptcy Act or in the General Orders to prevent an attorney for a trustee from making any disposition that he desires of his fees and to divide them with any person not expressly excluded.

That a division of fees between lawyers who collaborate in the rendition of service is lawful is expressly provided in subdivision 2 of Section 274 of the New York Penal Law, where, after forbidding certain acts by attorneys or counselors, out of abundance of caution it is declared:

> "But this subdivision does not apply to an agreement between attorneys and counsellors, or either to divide between themselves the compensation to be received."

Matter of Fitzsimmons, 174 N. Y. 15.
Scolaro v. *Ash*, 137 App. Div. 667.

It has likewise been held that the fact that one of the attorneys does substantially all the work will not entitle him to more than the agreed proportion where the other is ready and willing to serve whenever called upon.

Owen v. *Dudley*, 217 U. S. 488.

It is immaterial whether the client knew of the contract between the attorneys or not or whether he had any connection with it.

Acosk v. *Baker* (Tex.), 60 S. W. Rep. 273.

A general custom as to a division of fees between lawyers exists and has been enforced by the Courts.

Parker v. *Gartside*, 178 Ill. App. 634.
Ford v. *Freeman* (Cal.), 180 Pac. Rep. 545.
Gill v. *Mayne* (Iowa), 162 N. W. Rep. 24.
Underwood v. *Overstreet*, 223 S. W. Rep. 152.
Smith v. *Waldrop*, 77 So. Rep. 331.

See also:

Watkins v. *Sidberry*, 261 U. S. 571.
Candler v. *Candler*, Jacobs, 225.
Brown v. *Guy*, 4 East. 190.
White v. *Polhamus*, 1 N. Y. City Court 421.

III.

The contract sued upon is neither vague nor indefinite in its terms. It was left to Mr. Untermyer to determine how the fees allowed to the petitioners were to be divided. His determination that the respondent's assignor should have 40 per cent. and the petitioners 60 per cent. of these fees is controlling, there being no pretense of bad faith.

In *Goltra* v. *Weeks*, 271 U. S. 536, 547 549, the question related to the termination of a lease by the lessor, the chief of engineers, for non-compliance by the lessee with the terms of the contract. In the course of the opinion Mr. Chief Justice Taft said:

> "*Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive. There are many cases where the contract makes the satisfaction of one of the parties in respect of compliance the condition precedent to fulfillment, and good faith is all that is required to justify rejection of work or product tendered.*"

The cases referred to in the foregoing quotation are those which have enforced provisions contained in contracts for the erection of a building or for the construction of a railroad to the effect that performance shall be to the satisfaction of the architect or engineer or of the person or corporation for whom the work is done. Likewise the

familiar decisions which leave it to the determination of one of the parties to a contract as to whether or not the work done by the other in alleged performance of it has been completed to his satisfaction.

Kihlberg v. *United States*, 97 U. S. 398.
Sweeney v. *United States*, 109 U. S. 618.
Chicago, S. F. & Cal. R. R. Co. v. *Price*, 138 U. S. 185.
Ripley v. *United States*, 223 U. S. 695.
Bush v. *Jones*, 144 Fed. Rep. 942, 947.
Cope v. *Beaumont*, 181 Fed. Rep. 19.
J. H. Sullivan Co. v. *Wingenroth*, 203 Fed. Rep. 160.
Robinson v. *United States*, 251 Fed. Rep. 461.
Thompson-Starrett Co. v. *La Belle Iron Works*, 17 Fed. (2nd) 536, 541; certiorari denied, 274 U. S. 748.
Payne v. *Roberts*, 214 Pa. St. 546.

This principle has been applied in a variety of cases.

In *Heyman Cohen & Sons, Inc.* v. *M. Lurie Woolen Co., Inc.*, 232 N. Y. 112, the defendant entered into a contract to furnish specified merchandise to plaintiff, which further provided that *plaintiff* is given the "privilege * * * to confirm more of the above if (the defendant) can get more." It was held that the implication was plain *that the buyer was to fix the quantity* subject only to the proviso that the quantity shall be limited by the ability to supply. *In that case the buyer was the plaintiff.* Yet it was held that he could determine the quantity of merchandise to be supplied.

In *Brown* v. *Bellows*, 4 Pickering 179, where a contract for the sale of real property provided that the parties should name appraisers who were to put a valuation upon

the property, the Court held that the contract was binding.

In *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 38 N. E. 432, it was held that the contract between a stockholder and a corporation providing for the transfer of the stockholder's stock to the corporation *at a price to be fixed by the directors*, was valid. The Court said:

> "It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, *even though the party establishing it was interested;* provided the interest was known, and no objection made by the parties, and no fraud or bad faith is shown."

See also:

Matter of Fletcher, 237 N. Y. 440.

Nor is there legal objection to a contract whereby it is left to the determination of one of the parties as to how a certain fund is to be divided. There the parties have provided a method whereby that which might otherwise be indefinite and uncertain is made definite and certain.

Jones v. *Roberts*, 113 App. Div. 285, aff'd 189 N. Y. 497.

Attention is directed to the following contracts which were held to be sufficiently definite:

A contract to purchase what the buyer required in his business.

Church v. *Proctor*, 66 Fed. Rep. 240.

A contract to purchase buyer's entire consumption of phosphate rock.

Loudenback Fertilizer Co. v. *Tennessee Phosphate Co.*, 121 Fed. Rep. 298.

A contract to buy all quebracho needed for the buyer's factory.

Klipstein v. *Allen*, 123 Fed. Rep. 992.

An agreement to take care of the buyer's needs for the year.

T. B. Walker Mfg. Co. v. *Swift*, 200 Fed. Rep. 529.

A contract to buy and sell buyer's "August requirements."

Jenkins v. *Anaheim Sugar Co.*, 247 Fed. Rep. 958.

A contract to buy all iron that the purchaser should use, need or consume in his business.

National Furnace Co. v. *Keystone Mfg. Co.*, 110 Ill. 427.

A contract to purchase buyer's requirements of coal.

Minnesota Lumber Co. v. *Whitebreast Coal Co.*, 160 Ill. 85.

A contract to give buyer's trade.

Warden Coal Washing Co. v. *Meyer*, 98 Ill. App. 640.

A contract to buy all ice which the plaintiff required for his hotel.

Smith v. *Morse*, 20 La. Ann. 220.

A contract to buy all ice which the seller might desire to sell.

Burgess Fibre Co. v. *Broomfield*, 180 Mass. 283.

A contract to buy all wheels that the purchaser might "want" during the ensuing season.

Cooper v. *Lansing Wheel Co.*, 94 Mich. 272.

A contract to buy all ice necessary to carry on the buyer's business.

Hickey v. *O'Brien*, 123 Mich. 611.

A contract to buy all the cans which the purchaser should use in its factory.

Dailey Co. v. *Clark Can Co.*, 128 Mich. 591.

A contract for a shipper's insurance business for a season.

Ames-Brooks Co. v. *Aetna Ins. Co.*, 83 Minn. 346.

A contract to purchase the "necessary brick, lime and cement which I may require at my two jobs."

Miller v. *Leo*, 35 App. Div. 589, aff'd 165 N. Y. 619.

A contract by buyers for "their supply" of certain drugs.

Isahel Wheeler Co. v. *Mendelson*, 180 App. Div. 9.

It will be observed that in most of the cases enumerated it was left to the buyer who sought to enforce the contract

to determine what his needs were or how much of the merchandise he required during a stipulated period, and in all of these cases the contracts were held sufficiently definite to permit the person making the requisition to enforce his requirements.

The cases cited on behalf of the petitioners on this proposition have nothing in common with the facts of this case. In each of them the agreement sought to be enforced was palpably indefinite. There was nothing by which the compensation to be paid was determinable. Everything was left to the discretion of the defendant and he did not choose to make any determination as to the compensation to be paid. Here, however, Mr. Untermyer was to determine upon the terms of the division, and he made the determination. It was left to his judgment. The maxim *id certum est quod certum reddi potest* applies.

Barker v. *O'Grady*, 163 N. Y. Supp. 594, involved an oral contract with the defendant under which he agreed to make "an equitable division" with the plaintiff of fees received by him. The plaintiff sought a recovery in an action at law. The defendant had made no division and there was, therefore, nothing on which to base a recovery.

In *McDonald* v. *Acker, Merrill & Condit Co.*, 192 App. Div. 123, the defendant agreed to pay "a liberal and very substantial bonus in addition to a stated salary." Here, again, all depended upon the action of the defendant, and it did not act. Had the agreement been one to pay the plaintiff the amount which the plaintiff should determine to be fair and just a different result would have followed.

Canet v. *Smith*, 173 App. Div. 241, involved an agreement "to pay to the plaintiff a reasonable amount from the proceeds to be realized from the sale of merchandise

manufactured from (certain) secret processes. No method was provided for determining what was "a reasonable amount."

In *Featherstone* v. *Fowler*, 174 App. Div. 452, the defendant contracted to pay the plaintiff "for his time, his labor and his trouble." No method was provided in the contract for ascertaining the amount to be paid for the time, labor and trouble.

In *Bluemner* v. *Garvin*, 120 App. Div. 29, the defendant agreed that he "would fairly share with plaintiff the commissions received * * * on account of the contract with the City of New York." No method was provided whereby it was to be determined as to how the sharing would take place.

In *United Press* v. *New York Press Co.*, 164 N. Y. 406, the defendant agreed to pay plaintiff "a sum *not exceeding* $300 during each and every week that said news report is received" by the defendant. A sum not exceeding $300 might be nothing, or $1 or $5. Here, again, there was no method provided for determining the amount to be paid.

That this is the correct interpretation of the case just cited appears from the opinion of Mr. Justice Jenks in *Rosbach* v. *Sackett & Wilhelms Co.*, 134 App. Div. 130, where there was a contract of employment for a term of years at a salary "not less than $45 per week." That was held not to be indefinite.

In *Varney* v. *Ditmars*, 217 N. Y. 223, the agreement was: "If you boys will go on and continue the way you have been and get me out of this trouble and get the job started that were in the office three years, on the first of next January I will close my books and give you a fair share of my profits." Here, again, there was no method

provided whereby the share of profits to which the plaintiff was entitled was to be determined.

IV.

It is respectfully submitted that the petition for certiorari should be denied.

LOUIS MARSHALL,
Respondent's Counsel.

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CHARLES ELMOR

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 59.

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp,

Petitioners,

against

EDWARD M. NEARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

LOUIS MARSHALL,
Respondent's Counsel.

The Harris Press, 320 Varick St., N. Y. Tel. Walker 1460.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 59.

A. LEO WEIL and CHARLES M. THORP, doing business under the firm name and style of Weil & Thorp,

Petitioners,

against

EDWARD M. NEARY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

The action was brought to recover from the defendants 40 per cent. of an amount received by them as compensation for services in the performance of which the plaintiff's assignor collaborated, the amount being fixed pursuant to the terms of an agreement between them.

The trial proceeded before Allen Wardwell, Esq., as Referee, who acted by authority of the order discussed under Point I. The trial was a protracted one, a great mass of oral testimony and exhibits having been introduced. The Referee rendered a decision in favor of the respondent, his Findings of Fact and Conclusions of Law being set forth in full at pages 2 to 6, *infra*. A motion was made for the confirmation of this report before Judge Goddard in the United States District Court for the Southern District of New York, and resulted in a decision confirming the report, and thereafter judgment was rendered in conformity therewith.

No bill of exceptions was allowed, signed or filed.

A writ of error was allowed to the United States Circuit Court of Appeals for the Second Circuit, where a unanimous judgment of affirmance was rendered by the Court, consisting of Circuit Judges Manton, Learned Hand and Swan. The opinion appears on pages 175-183 of the Record.

No opinion was written by Judge Goddard. The opinion of the Referee is to be found in the Record on pages 48-74.

The brief of the petitioners fails adequately to indicate just what the Referee's Findings of Fact are, although, even under the view most favorable to the petitioners they are controlling. We are therefore constrained to quote at length these incontrovertible findings, on which are based the Referee's legal conclusion that the petitioners are jointly and severally indebted to the plaintiff in the sum of $57,064, with interest from November 15, 1920 (*Rec., pp.* 108-114).

The Referee's Findings of Fact.

After showing that the defendants were lawyers engaged in practice at Pittsburgh, Pa., and that Mr. Samuel Untermyer, the plaintiff's (respondent's) assignor, was engaged in the practice of the law in New York City, that before the commencement of this action he had assigned and transferred to the plaintiff all of his right, title and interest in and to the cause of action set forth in the complaint and amended complaint herein, and that the plaintiff is the owner thereof (*Rec., p.* 109), the Referee found as facts:

> "4. Prior to the month of August, 1917, and in or about 1915, plaintiff's assignor was retained as attorney and counsel for a large number of creditors of one Josiah V. Thompson, who resided at Uniontown, Pa., where he was engaged in the business of a banker and in the operation of coal mines, to enable the said creditors to collect from the said

Thompson and out of his property his indebtedness to them, which amounted to many millions of dollars. *The affairs of the said Thompson were greatly involved, and it was agreed in the interests of his creditors that the extensive properties of the said Thompson should be conserved so that they might be applied equitably to the payment of the claims of his creditors*" (*Rec., p.* 109, *fol.* 166).

"5. On or about January, 1915, such proceedings were had that receivers of the estate of said Thompson were appointed by the Court of Common Pleas of Fayette County, Pennsylvania, and during the pendency of such receivership said estate was protected from being disrupted by the action of hostile lienors who sought to dispose of its assets under circumstances which would have resulted in a sacrifice of the interests of the creditors of said Thompson, and *such assets were conserved principally through the instrumentality of plaintiff's assignor, who represented from 90% to 95% of the creditors of said Thompson, whose claims aggregated approximately $15,000,000.00*" (*Rec., pp.* 109, 110).

"6. The receivership aforesaid having been set aside by virtue of a decision of the Supreme Court of Pennsylvania on May 7th, 1917, plaintiff's assignor acting under instructions of the creditors by whom he had been retained and for the benefit of all of the creditors of the said bankrupt being satisfied *that the general creditors of the said Thompson could only be protected from the disruption, disintegration and sacrifice of the estate of said Thompson which would have resulted from forced sales on the foreclosure of mortgages and other liens and similar sales under execution upon judgments recovered against said bankrupt by the action of a court in bankruptcy, determined to institute such bankruptcy proceedings.* To that end he explained to defendants the facts relating to said estate and informed them of his plans looking to the *protection of the creditors and the conservation of the estate of said Thompson* and retained them to conduct such bankruptcy proceedings under his supervision upon a mutual understanding

and agreement with the defendants that they were to be allowed and were to accept in full payment for their services in connection with such proceedings the sum of Five thousand ($5,000) Dollars" (*Rec., p.* 110, *fol.* 167).

"7. *Prior to said retainer of the defendants by plaintiff's assignor, the defendants had had no interest in, or connection with said Thompson, his Estate or his creditors*" (*Rec., p.* 110).

"8. Upon the understanding and agreement aforesaid, bankruptcy proceedings were duly instituted on the petition of three of the creditors of the said Thompson in the District Court for the Western District of Pennsylvania for his adjudication as a bankrupt, and thereupon such proceedings were had, that on or about September 10, 1917, the said Thompson was adjudicated a bankrupt and trustees of his estate were duly appointed and the said Estate was thereupon administered in such bankruptcy proceedings, *the defendants herein acting at the instance of plaintiff's assignor and for the creditors represented by him whose interests were identical with those of the general creditors of the said Thompson*" (*Rec., p.* 110).

"9. *The affairs of the Thompson Estate were very complicated and the plaintiff's assignor was the person most conversant with them from the legal aspect. The trustees in bankruptcy in selecting the defendants as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendant's connection with plaintiff's assignor in relation to such creditors*" (*Rec., p.* 111, *fol.* 168).

"10. In the course of the administration of the Estate of the said Thompson, various complications arose which prolonged the period of the administration of the Estate beyond that contemplated at the time of the institution of the said bankruptcy proceedings and which rendered it necessary for the defendants *and plaintiff's assignor and of the firm of Guggenheimer, Untermyer & Marshall, who acted for the plaintiff's assignor, together to perform services, which in extent and laboriousness*

exceeded those which it was originally believed it would be necessary for the defendants to perform in the course of the administration of the said estate in bankruptcy" (Rec., p. 111).

"11. *Recognizing that fact, plaintiff's assignor and the defendants thereupon agreed that they should together perform such services and that the compensation of the defendants for services in such bankruptcy proceedings was not to be limited to the sum of Five thousand ($5,000) Dollars as theretofore stipulated, and in lieu of the compensation originally stipulated, it was mutually agreed that plaintiff's assignor and defendants should collaborate in rendering such services as were necessary and proper in such bankruptcy proceedings for the conservation of the estate and the protection of the creditors of the bankrupt and that the defendants were to receive for the services so to be rendered by them in the bankruptcy proceedings, out of such allowances as should eventually be made by the court in payment therefor, such sum as plaintiff's assignor should consider just and equitable, the remainder of the amount so allowed to be paid to him" (Rec., p. 111, fol. 169).*

"12. *The said agreement referred to in Finding 11 applied only to fees for services rendered in connection with the preservation of the bankrupt's estate against forced sales by mortgagees, judgment creditors and other lienors and the sale of the properties of the estate and did not apply to fees for services rendered in connection with the general administration of the estate after all of the properties embraced in the estate had been sold or otherwise disposed of" (Rec., pp. 111, 112).*

"13. Pursuant to said agreement, the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor, and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor, by the trustees in bankruptcy upon the sale thereof, for which allowances*

were made in such bankruptcy proceedings by the District Court of the United States for the Western District of Pennsylvania to the defendants at various times, between September 3, 1918, and October 27, 1920, *to an aggregate amount received by them for such services of $142,659.98, a substantial part of the services for which said allowances were made having been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him*" (*Rec., p.* 112, *fols.* 169, 170).

"14. *On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28th, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement determined the division of the sum of $142,659.98, theretofore received by the defendants as aforesaid, was that the defendant should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision*" (*Rec., p.* 112).

"15. Thereafter the defendants refused to comply with his determination and although he demanded that they pay over to him 40% of the sum so received by them, they refused to pay him such sum or any part thereof, and they are now indebted to the plaintiff therefor in the sum of $57,064.00 with interest from November 15, 1920" (*Rec., p.* 112).

On the basis of these findings of fact the Referee as a conclusion of law determined that the petitioners were indebted to the respondent in the sum of $57,064, with interest from November 15, 1920, and directed judgment for that amount and costs, including Referee's and stenographer's fees.

In the presentation of the respondent's argument it will be contended:

(1) That the stipulation and order on which the reference to Mr. Wardwell was based made him an arbitrator whose determination is not reviewable.

(2) In the event that this proposition is not sustained, we next contend that if in the state of the record there

is anything that may be reviewed, it must be limited to a consideration of the proposition as to whether the Findings contained in the report of the Referee justify the Conclusions of Law awarding judgment.

Shipman v. *Straitsville Central Mining Co.*, 158 U. S. 356, 361.

Dooley v. *Pease*, 180 U. S. 126, 131.

David Lupton's Sons v. *Automobile Club*, 225 U. S. 489, 494.

Chicago, M. & St. P. Ry. Co. v. *Clark*, 92 Fed. Rep. 968.

Roessler & Hasslacher Chemical Co. v. *Standard Silk Dyeing Co.*, 254 Fed. Rep. 777.

United States v. *One Diamond Necklace*, 267 Fed. Rep. 696.

Aronstam v. *All Russian etc. Societies*, 270 Fed. Rep. 406.

(3) In that contingency it will be in order to discuss the two propositions presented by the petitioners, which will be considered under Points II and III (*infra*).

POINTS.

I.

The stipulation and order on which the reference herein was based, made the Referee an arbitrator, whose determination is not reviewable.

This cause was tried before Allen Wardwell, Esq., as Referee, under an order which provided:

> "Upon reading and filing the annexed stipulation and on motion of Guggenheimer, Untermyer & Marshall, attorneys for the plaintiff, it is
>
> ORDERED that the trial of the above entitled action be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same with all the powers to act and rule upon the said trial possessed by the Court" (*Rec., p.* 77).

The stipulation referred to, and on which the order was based, provided:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the trial of this cause be and the same hereby is referred to Allen Wardwell, Esq., as Referee, to hear, try and determine the same, with all the powers to act and rule upon said trial possessed by the Court" (*Rec., p.* 78).

It thus clearly appears that the stipulation contains no waiver of a jury as provided by Section 649 of the Revised Statutes. This, we contend, made the trial before the Referee an arbitration and that the determination reached is not reviewable.

Section 648 of the United States Revised Statutes provides for the trial of issues of fact by jury, with exceptions not here applicable.

Section 649 provides:

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, *whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury.* The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

This section is derived from the Act of March 3, 1865, Chapter 86.

Section 700 reads:

> "When an issue of fact in any civil cause in the circuit court is tried and determined by the court without the intervention of a jury according to section 649, *the rulings of the court in the progress of the trial of the cause, and if excepted to at the time and duly presented by a bill of exceptions*, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is spe-

cial the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This section is likewise derived from the Act of March 3, 1865, Chapter 86.

In the present case there is no bill of exceptions. The only exceptions taken are those referred to above and none of them were to rulings of the Court in the progress of the trial and none of the exceptions were taken at the time the rulings were made.

Trials without a jury in actions at law in the District Court are now controlled by the provisions of Sections 649 and 700 of the United States Revised Statutes, formerly applicable solely to the Circuit Courts, which were abolished by Sections 289 and 291 of the Judicial Code and their powers transferred to the District Courts.

Ex parte United States, 226 U. S. 420.
Nashville Interurban Ry. v. *Barnum*, 212 Fed. Rep. 634.

Prior to 1912 a jury could not be waived in an action at law in the District Courts and a decision of such a cause tried without a jury was not reviewable in any event.

Campbell v. *United States*, 224 U. S. 99, 105.
Doty v. *Jewett*, 19 Fed. Rep. 337, 338.
Eastern Oil Co. v. *Holcomb*, 212 Fed. Rep. 126.

In *Nashville Interurban Ry.* v. *Barnum*, *supra*, Judge Rogers, speaking for this Court, after reviewing the statutes relating to the District and Circuit Courts and the effect of the abolition of the latter, said:

"It thus appears that as respects the Circuit Courts, express provision was made for a written waiver of a jury. In those courts *when a jury was waived by written stipulation* and the case was tried to the Court, the proceeding remained judicial, not being converted into arbitration. This

> left the findings of fact by the trial judge to be dealt with on writ of error in the same manner as the findings of a jury would be. * * * We must therefore accord to findings of fact, in a case tried to the Court without a jury, *there being a stipulation in writing waiving the jury*, the same effect as we would give to a verdict."

It will therefore be useful to consider the decisions relating to the effect of Sections 649 and 700 and the consequences of non-compliance therewith.

(1) *Under these provisions it has been the long established rule that whenever cases are submitted for trial without a jury, and a stipulation in writing waiving a jury has not been filed with the clerk, as provided in Section 649, the trial, if before a court or before a referee, virtually constitutes an arbitration, and a judge or referee who acts in the absence of such written waiver acts solely as an arbitrator. His decision is not reviewable.*

In *Duignan* v. *United States*, 274 U. S. 195, Mr. Justice Stone clearly stated the rule regarding the waiver of a jury trial:

> "The right to a jury trial may be waived where there is an appearance and participation in the trial without demanding a jury (*Kearney* v. *Case*, 12 Wall. 275; *Pereyo* v. *Dodge*, 163 U. S. 160, 166). Section 649 of the Revised Statutes provides that issues of fact may be tried by a court without a jury, *upon written stipulation of the parties*, and that the finding of the court upon the facts shall have the same effect as the verdict of the jury. But this section does not preclude other kinds of waiver (*Kearney* v. *Case*, *supra*). *Its purpose and effect, when read together with Sections 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment. See Law* v. *United States*, 266 U. S. 494, 496; *Cf. Fleischmann Co.* v. *United States*, 270 U. S. 349, 355, 356."

Even where a trial by jury *has been waived in writing* the appellate court is limited to the sufficiency of the facts found to support the judgment and to rulings excepted to and presented by a bill of exceptions.

> *Lewellyn* v. *Electric Reduction Co.*, 275 U. S. 243, 248.
>
> *Ingram-Day Lumber Co.* v. *McLouth*, 275 U. S. 471, 474.

In the present case there was neither a written waiver of trial by jury nor a bill of exceptions and the case comes within the rule laid down in *Duignan* v. *United States*, *supra*, and the decisions now collated.

> *Campbell* v. *Boyreau*, 21 How. 223.
> *Flanders* v. *Tweed*, 9 Wall. 425.
> *Kearney* v. *Case*, 12 Wall. 275.
> *Swift* v. *Jones*, 145 Fed. Rep. 489.
> *Ford* v. *U. S.*, 260 Fed. Rep. 657.
> *Dundee Mortgage Co.* v. *Hughes*, 124 U. S. 157.
> *Roberts* v. *Benjamin*, 124 U. S. 64.
> *Shipman* v. *Mining Co.*, 158 U. S. 361.
> *Thompson-Starrett Co.* v. *La Belle Iron Works*, 17 Fed. (2nd) 635; certiorari denied, 273 U. S.

To facilitate the examination of these cases by the Court, the liberty is taken of quoting from them, especially because they have sometimes been misunderstood.

In *Campbell* v. *Boyreau*, *supra*, Mr. Justice Taney said (*pp.* 226, 227):

> "The findings of issues in fact by the Court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this

Court, therefore, cannot regard the facts so found as judicially determined in the Court below, nor examine the questions of law as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the Court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this Court cannot regard the facts found by the judge as having been judicially determined in the Court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

In *Flanders* v. *Tweed*, *supra*, Mr. Justice Nelson said:

"It is impossible to misunderstand the condition upon which, according to the act of March 3rd, 1865, the parties are authorized to waive a trial by jury, and substitute the Court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law. *That condition is the filing with the clerk a written stipulation, signed by the parties, or their attorneys.* The necessity of this law, for the purpose designed, will appear by a reference to a few of the decisions of this Court. One of the latest is the case of *Campbell et al.* v. *Boyreau*. • • • *This case, and those referred to by the learned Chief Justice, establish beyond question that the act of Congress was essential in order to preserve to the parties submitting a cause to a trial before a Court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court.* • • •"

In *Kearney* v. *Case*, *supra*, Mr. Justice Miller, after referring to the provisions of the Act of 1865, which are now Sections 649 and 700 of the United States Revised Statutes, said:

> "The fourth section enacts that issues of fact in civil cases, in any Circuit Court of the United States, may be tried and determined by the Court without the intervention of a jury, *whenever the parties or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury.* It then proceeds to prescribe the mode of finding the facts, and the effect to be given to such finding, and provides for a review of the case by this Court. The manner in which the record is to be prepared for this and the extent of the inquiry in this Court are specifically pointed out. The question arises on this statute whether this mode of submitting a case to the Court without a jury was intended to be exclusive of all other modes, *so that if there is no stipulation in writing waiving a jury*, there is error, for which the judgment must be reversed. Although the language of the section might admit of that construction, it is not the only one of which it is susceptible. As stated in the case already referred to, of *Flanders* v. *Tweed*, *the main purpose of the act undoubtedly was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the Court alone.* This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former decisions, based on the idea that in such cases the Court did not sit as a court of law, but as *quasi arbitrators*. To remove this difficulty, the statute provided a mode by which the parties *who agreed to waive a jury* should have the benefit of a writ of error to the rulings of the Court on questions of law. The language of the section is that the stipulation may be *filed with the clerk of the court*, which is undoubtedly designated to enable the parties to make agreements in vacation; and it is required to be in writing, to prevent either party demanding a jury unexpectedly at the trial. * * * We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the Court

unless they do so by a written stipulation, *but that it was the intention to enact that if the parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation*, and must then ask the Court to make a finding of such facts as they deem essential to the review, and ask the ruling of the Court on points to which they wish to except. *If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the Court on all matters submitted to it.* This we understand to be the effect of the opinion in *Flanders* v. *Tweed*. But, although a written stipulation in the Circuit Court is essential to a review in this Court, is the presence of the agreement or its copy in the transcript sent here indispensable? A copy of it should come up, as observed by Mr. Justice Nelson, and that is the more appropriate evidence of compliance with the statute. Still we are not prepared to say that if it shall affirmatively appear in any other part of the record proper that such a *writing* was made by the parties, that it will not be sufficient here. If, for instance, it is stated in the finding of facts by the court, or in the bill of exceptions, or in the record of judgment entry, that such a stipulation was made in writing, the record would show that the condition in which a review is allowed existed, and we would not feel at liberty to contradict the record in this respect. *In a case where there is no evidence that it was submitted in writing under the statute, but the record shows affirmatively that the parties waived a jury, we hold such evidence of waiver to be sufficient to support the judgment, but not sufficient to authorize a review of the rulings of the Court at the trial.* • • • The record before us presents, in the light of these views, a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the Court as provided by statute."

In *Swift & Co. v. Jones, supra*, Judge Waddill, speaking for the Circuit Court of Appeals for the Fourth Circuit, after quoting from Sections 648, 649 and 700 of the Revised Statutes, said:

> "These three sections constitute the whole Federal law upon the subject, so far as this case is concerned, where the facts were ascertained without the intervention of a jury * * * Such sections constitute within themselves a perfect and complete system for the guide and government of the Federal Courts, and ought not to be departed from. Nothing is better settled than that whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. * * * It is the duty of the trial courts to adhere rigidly to these enactments of Congress prescribed for their government, and the presumptions are all unfavorable to the waiver of the right of trial by jury; and whenever cases are submitted to them for trial without a jury, it must plainly appear that the waiver was made as prescribed by the act of Congress."

In *Dunder Mortgage Co. v. Hughes, supra*, Chief Justice Waite said:

> "The case therefore comes here upon the ruling at the trial by the Circuit Court without a jury, when there had been no waiver of a jury, as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. Rulings of a Circuit Court made under such circumstances are not reviewable here. *Bond v. Dustin*, 112 U. S. 604, and the cases there cited."

In *Roberts v. Benjamin, supra*, an order was made in the Circuit Court referring the action to a Referee "to hear, try and determine the issues therein." The Referee filed a report finding facts and conclusions of law and directing a judgment for the plaintiff. The defendant applied to the Court for a new trial on the case and exceptions, in which he excepted to three of the conclusions

of law. There had been no waiver in writing of a trial by jury. On writ of error it was held that the Court could not review any exceptions to the admission or exclusion of evidence or any exceptions to findings of fact by the Referee.

See also:

County of Madison v. *Warren*, 106 U. S. 622.
Road District v. *St. Louis S. W. Ry.* 257 U. S. 547, 562.

The Circuit Court of Appeals for the Ninth Circuit has recently made like decisions:

Bouldin v. *Alto Mines Co.*, 299 Fed. 301.
Grover Corpn. v. *Hercules Gasoline Co.*, 16 Fed. (2nd) 459.

In *Thompson-Starrett Co.* v. *LaBelle Iron Works* (*supra*), where there was in fact "a written waiver of trial by jury subject to review by the appellate courts on appeal, writ of error or otherwise," Judge Learned Hand, speaking for this Court, said:

> "It is quite true that a reference 'to hear and determine,' even on written stipulation, is not such a trial [before the District Court]. • • • Such cases are in fact tried by an arbitrator, a practice known to the common law. *Hecker* v. *Fowler*, 2 Wall. 123. Moreover, though the referee does not decide the cause, but only reports to the court, if the consent is not by written stipulation as provided in Section 649, while the court decides the cause, it too acts as arbitrator, and the trial is not under Section 649. *Shipman* v. *Streatsville Mining Co.*, 158 U. S. 356, 361. It is only when the two conditions co-exist that Section 649 applies."

(2) *The State laws and practice are not applicable. The Act of Congress, which is explicit, controls. The Conformity Act does not come into play.*

Graham v. *Bayne*, 18 How. 60.
Kelsey v. *Forsyth*, 21 How. 85.
Erkel v. *United States*, 169 Fed. Rep. 623.
Swift & Co. v. *Jones* (*supra*).
Doty v. *Jewett* (*supra*).

In *Doty* v. *Jewett*, *supra*, Mr. Justice Blatchford said:

> "It is urged that the trial by the Court took place as it would have done in an equity suit; and that, as the case is one reviewable in one or the other of the two modes, the objection to the mode may be waived by the other side, and such waiver has taken place in this case. Some authorities under the State practice in New York are referred to. But the question is one of jurisdiction. The agreement of parties cannot authorize this Court to revise a judgment of the District Court in any other mode of proceedings than that which the law prescribes, nor can the law or practice of a State, in regard to the proceedings of its own courts, authorize this Court or the District Courts to depart from the modes of proceeding and rules prescribed by the acts of Congress. *Kelsey* v. *Forsyth*, 21 How. 85, 88; *Merrill* v. *Petty*, 16 Wall. 338, 347; *United States* v. *Emholt*, 105 U. S. 414, 416."

In *Erkel* v. *United States*, *supra*, decided by the Circuit Court of Appeals for the Ninth Circuit, Judge Gilbert, after referring to Sections 649 and 700 of the Revised Statutes and stating the terms of those sections, said:

> "Under that statute it has been uniformly held that if a case is tried before the Court without a jury, *and there is no written stipulation waiving a jury, none of the questions decided at the trial can be re-examined in an Appellate Court on writ of error.* • • •"

(3) *An oral waiver of trial by jury does not satisfy the statute. Nothing but a stipulation in writing waiving a jury will suffice.*

Illinois Surety Co. v. *United States*, 229 Fed. Rep. 527.
Madison County v. *Warren*, 106 U. S. 622.
Rush v. *Newman*, 58 Fed. Rep. 158.
Andes v. *Slawson*, 130 U. S. 435.

In *Illinois Surety Co.* v. *United States*, *supra*, Judge Rogers, speaking for this Court said:

> "The statutes require that issues of fact in actions at law be tried by jury (U. S. Comp. St., 1913, Sec. 1584), unless the jury be waived by a stipulation in writing (U. S. Comp. St., 1913, Sec. 1587), when the facts may be tried by the Court and its rulings may be reviewed as provided in the statute (U. S. Comp. St., 1913, Sec. 1068). This case having been tried without a jury, and there having been no written stipulation waiving a jury trial, it is well settled that none of the questions decided at the trial can be re-examined in this Court on writ of error."

In *County of Madison* v. *Warren*, *supra*, Chief Justice Waite said:

> "This is a case tried and determined by the Court without the intervention of a jury. The record does not show any stipulation in writing waiving a jury. The errors assigned all relate to rulings of the Court on the trial, excepted to at the time, and presented by a bill of exceptions. The rule is well settled, that if a written stipulation waiving a jury is not in some way shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error."

In *Rush* v. *Newman*, *supra*, Judge Caldwell, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "There is in the record what purports to be a special finding of facts by the Court. But the rec-

ord does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, as required by section 649 of the Revised Statutes of the United States. The recital in the record that 'both parties in open court having waived a jury, and agreed to trial before the Court,' does not show a compliance with section 649. The following recitals in the record have been held insufficient for this purpose: 'The issue joined, by consent, is tried by the court, a jury being waived'; and 'the above cause coming on for trial, by agreement of parties, by the Court, without the intervention of a jury'; and 'the parties having stipulated to submit the case for trial by the Court without the intervention of a jury'; and 'said cause being tried by the Court without a jury, by agreement of parties'; and 'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, a jury being waived by both parties'—*Bond* v. *Dustin*, 112 U. S. 604, 608, 5 Sup. Ct. Rep. 296; and 'jury waived tentatively,' and 'finding of facts and verdict'—*Merrill* v. *Floyd*, 2 C. C. A., 58, 50 Fed. Rep. 849. In the absence of a statute authorizing it, the finding of issues of fact by the Court is not a judicial act of which this Court can take any notice. *Campbell* v. *Boyreau*, 21 How. 223; *Rogers* v. *U. S.*, 141 U. S. 548, 12 Sup. Ct. Rep. 91; *Merrill* v. *Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849. The sufficiency of the facts found by the lower court to support the judgment can only be considered by this Court when a jury has been waived in writing, as provided in section 649. When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury; and the only question this Court can consider is the sufficiency of the declaration to support the judgment. *Flanders* v. *Tweed*, 9 Wall. 425; *Kearney* v. *Case*, 12 Wall. 275; *Alexander Co.* v. *Kimball*, 106 U. S. 623, 2 Sup. Ct. Rep. 86; *Bond* v. *Dustin*, 112 U. S. 604, 5 Sup. Ct. Rep. 296; *Campbell* v. *Boyreau*, 21 How. 223; *Merrill* v. *Floyd*, 2 C. C. A. 58, 50 Fed. Rep. 849."

In *Andes* v. *Slauson*, *supra*, an action at law was tried before a jury at the Circuit Court at chambers by con-

sent of the parties under an order providing that it should be so tried. After judgment was rendered the defendant sought to review it by bill of exceptions and writ of error. Mr. Justice Gray said:

> "The authority of this court to review the judgments of the Circuit Court by bill of exceptions and writ of error is regulated exclusively by the acts of Congress and the practice of the Courts of the United States, without regard to the statutes of the States or the practice of its courts. *Chatanooga Co., Petitioner*, 128 U. S. 544. The right of review is limited to questions of law appearing upon the face of the record, and does not extend to matters of fact or of discretion; questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, *or by the court after due waiver in writing of a jury trial*; and when the trial is by rule of court and consent of parties before a referee or arbitrator, no question of law can be reviewed on error, except whether the facts found by him support the judgment below. *Campbell* v. *Boyreau*, 21 How. 223; *Bond* v. *Dustin*, 112 U. S. 604, 606; *Paine* v. *Central Vermont R. R.*, 118 U. S. 152."

See also:

James Dickinson Farm Mortgage Co. v. *Skinner*, 12 Fed. (2nd) 772.

Virginia Iron, Coal & Coke Co. v. *Woodside Cotton Co.*, 6 Fed. (2nd) 443.

II.

The petitioners' contention that the contract between them and the respondent's assignor was illegal and violative of public policy is without justification.

The correctness of the Referee's Findings of Fact above quoted *in extenso* cannot be challenged. They were made by a lawyer of great ability, vast experience and unques-

tioned fairness and integrity, than whom there is nobody at our bar possessed of higher ethical standards or a finer conception of professional ethics. They were confirmed by Judge Goddard in the District Court. The Circuit Court of Appeals after careful considered decided that they justified the conclusion of the Referee based on them and found no infraction of public policy.

As a result of the relation created on Mr. Untermyer's initiative between him and the petitioners, the latter first learned of the Thompson estate. At his instance they instituted the bankruptcy proceedings. They became the attorneys for the trustees in bankruptcy in the regular course of events without any agreement of any kind with Mr. Untermyer looking to their designation as such. They had the benefit of the exceptional information possessed by Mr. Untermyer with regard to the property and "the very complicated affairs" of the bankrupt, which was invaluable. They likewise had the advantage of his cooperation in respect to the many matters which arose in the course of the complications attendant upon the bankruptcy proceedings. There was no conflict of interest between the creditors represented by Mr. Untermyer and the comparatively small fraction of other creditors in like situation who were not represented by him. What was to the advantage of one inured equally to the benefit of every other creditor. By the joint efforts of Mr. Untermyer and the petitioners, who collaborated for the sole benefit of the creditors who together sought the welfare of all of the creditors alike, the bankrupt estate, on which the creditors had to depend for payment, was conserved, instead of being wasted and dissipated and the bankrupt's assets were ultimately distributed. Instead of increasing them, this method of procedure in reality reduced the expenses of the creditors. It assured them a maximum of protection and a minimum of expenditure. The allowances made out of the estate were sanctioned by the Court, and necessarily by the trustees, who "knew of defendants' connection with plaintiff's assignor in relation to such

creditors," and included the services rendered by and for Mr. Untermyer for which payment was received by the petitioners.

The agreement between these lawyers merely related to a division of the compensation allowed for the services rendered by the petitioners and respondent's assignor according to the latter's arbitrament.

The petitioners have rung the changes on the use by the Referee of the expression in Finding 8 (*Rec., p.* 110) and Finding 13 (*Rec., p.* 112), that the defendant rendered services to the bankrupt's estate under the "supervision" of plaintiff's assignor, in the sense that it was intended to ignore the trustees and the bankruptcy court. It is clear that the Referee had no such intention. It is evident that what was in the minds of all the parties was that Mr. Untermyer, who was to an extraordinary degree conversant with the affairs of the estate, was to exercise the "oversight" of counsel over the proceedings, not in a maleficient but a beneficent sense. The context shows this to be the fact. The Thirteenth Finding begins:

> "13. Pursuant to said agreement the defendants continued to render services in the aforesaid bankruptcy proceedings *under the general supervision and with the active aid, assistance and collaboration of the plaintiff's assignor and of Guggenheimer, Untermyer & Marshall, who acted for him, which resulted in the conservation of the assets of the bankrupt for the benefit of his creditors and the realization of large sums therefor by the trustees in bankruptcy upon the sale thereof, for which allowances were made, etc.*"

To attribute the doing or the contemplation of a sinister or improper purpose from such a transaction would taint the most innocent action. Such a course would be a reversal of well established legal principles.

In *Steele* v. *Drummond*, 275 U. S. 199, 204-206, in which the most recent pronouncement on the subject now under consideration was made, the principles applicable to the

defense that a contract is void as being contrary to public policy were carefully formulated. There it was claimed that a contract for the extension of a railroad was illegal as opposed to public policy because one of the parties agreed to procure the passage of ordinances in a town through which the railway was to run.

The rules there laid down may be summarized as follows:

> (*a*) It is only because of the dominant public interest that one who has had the benefit of performance by the other party is permitted to avoid his own obligation on plea that the agreement is illegal.
>
> (*b*) As respects the enforceability of a contract claimed to violate public policy it is a matter of great public concern that freedom of contract be not lightly interfered with.
>
> (*c*) It is only in clear cases that contracts will be held void as against public policy, since the principle must be cautiously applied to guard against confusion and injustice.
>
> (*d*) Detriment to public interest will not be presumed in a contract where nothing sinister or improper is done or contemplated.

In this connection it is proper to note, by way of contrast, the statement in the *Petitioners' Brief, p.* 14:

> "It is immaterial that the particular contract in controversy, as, for example, that here, is not tainted with a perverted motive • • •."

The decision in *Steele* v. *Drummond* is in line with overwhelming authority.

(a) *The burden of proof to show that an agreement is illegal or against public policy rests upon the defendant. The principle ut res magis valeat quam pereat applies with full force in such a case.*

Because of the importance of this proposition, we deem it desirable to collate a number of the leading cases in which this rule has been laid down.

In *Dykers* v. *Townsend*, 24 N. Y. 57, it was claimed that the contract was void as against the Stock Jobbing Act. The defense was overruled, Judge Hoyt saying:

> "On the contrary, the presumption is that the contract is valid until the contrary is shown by the defendant. Where a contract is apparently valid upon its face, the party seeking to impeach it must prove that it was made under such circumstances or for such purpose as to render it void, before the defense can be made available."

In *Curtis* v. *Gokey*, 68 N. Y. 300, it was claimed that the contract, which contained a covenant whereby a retiring partner bound himself not to engage in a certain business for a specified period of time or so long as the other party should continue the business, was in restraint of trade. The defense was rejected, Judge Allen saying:

> "*The law will not presume an agreement void as illegal or against public policy when it is capable of a construction which would make it consistent with the laws and valid.*"

In *Ormes* v. *Dauchy*, 82 N. Y. 443, the contract sought to be enforced was made in this State to advertise a lottery in other States. There was no proof that such advertising was in violation of the laws of those States. The contract was, therefore, enforced, Judge Miller saying:

> "As there is no proof that the law of any other State was violated, and as the law will not presume an agreement void as illegal or against public policy when it is capable of a construction which would make it consistent with the laws and valid, it cannot be considered as illegal."

In *Richards* v. *Wiener Co.*, 207 N. Y. 59, an action was brought upon a contract made by a corporation to purchase its own stock. The action was defended on the ground that the contract was not enforceable under Section 664 of the Penal Law, which made it a misdemeanor for a director to apply any funds of the corporation "except surplus profits" to that purpose. There was no proof as to whether or not there were surplus profits. It was held that the defense could not be sustained, Judge Haight, quoting from the opinion of Mr. Justice Scott in the Court below (145 App. Div. 353) saying:

> "The law will not presume, unless forced to do so, that a person intends to do an illegal act. It will not, therefore, presume that the parties intended to make an illegal contract. The contract itself, therefore, was perfectly legal subject to certain limitations upon its enforceability. * * * In defending against plaintiff's attempt to enforce it the burden rested upon defendant to show that it would be illegal to do so, for there is no presumption one way or the other as to the existence of a surplus. The defendant assumed this burden but failed in sustaining it."

In *Appleton Co.* v. *Warbasse*, 92 Misc. Rep. 42, an action was brought by the plaintiff to recover expenses incurred in the defense of an action for libel brought against the plaintiff, the libel being contained in a book written by the defendant and published by the plaintiff. The basis of the action was a clause in the contract between the author and the publisher whereby the former agreed to hold harmless and defend the publisher against any suit, claim, demand or recovery by reason of any injurious or libelous matter alleged to be contained in the work. The defendant claimed that this clause of the contract was contrary to public policy. Mr. Justice Shearn, overruling the objection, said:

> *"The validity of the contract is to be determined as of the time when the parties entered into it. 'In order to invalidate the contract it should appear*

> *that the agreement itself contemplated illegal acts or acts condemned as against good morals or public policy. It is not sufficient that acts were done which might be condemned, but the test is the intention of the parties—what acts were contemplated by them to be performed in carrying out the agreement.' Drake* v. *Lauer*, 93 App. Div. 86, affd. 182 N. Y. 533."

Quoting from *Jewett Publishing Co.* v. *Butler*, 159 Mass. 517, the opinion proceeds:

> "In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter, or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter, or that the contract on its face provided for or prompted an illegal act."

In *Oregon Railroad & Navigation Co.* v. *Dumas*, 181 Fed. Rep. 781, decided by the Circuit Court of Appeals for the Ninth Circuit, where, in defense of an action to recover damages for failure to supply cars for the transportation of plaintiff's apple crop, the defendant contended that the shipper was afforded discriminatory rates and that the contract was therefore illegal and void, the Court, in rejecting that defense, said:

> "There was nothing in its terms to show that the plaintiff was to receive more than his proportionate share of cars, or that others would be injured thereby. A court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical."

In *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Walsh*, 211 N. Y. 90, it was contended that a contract between the railroad company and the State was invalid so far as it provided for the delivery to the former of a permanent

easement to occupy canal lands for railroad purposes. Judge Collin, dealing with that proposition, said:

> "The ascertainment of the substantial intent of the parties is the fundamental rule in the construction of all agreements (*Canal Co.* v. *Hill*, 15 Wall. 94). An agreement will not be adjudged illegal where it is capable of a construction which will make it valid (*Lorillard* v. *Clyde*, 86 N. Y. 384, 387; *Hobbs* v. *McLean*, 117 U. S. 567)."

In *Hobbs* v. *McLean*, 117 U. S. 567, just referred to, which was an action between partners for an accounting, which involved a settlement of profits and losses under a contract with the Government, it was claimed by the defendant that the contract of partnership was illegal because in violation of statutes which forbade all transfers and assignments of any claim upon the United States and the transfer of any contract or order or interest therein. Mr. Justice Woods, dealing with this contention, said:

> "But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

In *Lorillard* v. *Clyde*, 86 N. Y. 384, 387, Judge Andrews said:

> "We think the complaint discloses a good cause of action. The presumption is in favor of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid."

In *Shedlinsky* v. *Budweiser Brewing Co.*, 163 N. Y. 439, Judge Gray said:

> "It is a generally accepted rule that when a contract is to do a thing, which cannot be performed without the violation of the law, it is void; but when it may be performed lawfully, as well as in violation of the law, it is valid; *in the absence at least, of proof that the intention of both parties was that the law should be violated.* The construction of a contract should be, when it is possible, in favor of its legality. * * * A lease, valid, as this was, upon its face, is not to be condemned as unlawful and, therefore, an unenforceable instrument, because the purpose for which the demised premises were to be used might, under certain circumstances, be within the prohibition of a statute. When the operation of the prohibition depends upon the proof and that is inconclusive upon the subject, then the obligation of the parties remains unaffected. *The presumption of a lawful intention must always prevail and the burden of overthrowing it is not met by him who asserts it by proof, which is quite consistent with a perfectly lawful purpose, however, demonstrating that, if effectuated in a certain way, it would contravene the law.*"

See also:

> *In re Ray*, 203 Fed. Rep. 418.
> *Joy* v. *Glidden Varnish Co.*, 83 Fed. Rep. 908.
> *Illinois Surety Co.* v. *O'Brien*, 233 Fed. Rep. 953.
> *Salmon* v. *Stillman*, 66 Fed. Rep. 677.
> *Milbank* v. *Jones*, 127 N. Y. 370.
> *Harris* v. *White*, 81 N. Y. 532.

It has also been frequently adjudged that if a contract can be performed in any legal method, it must be assumed that such method was contemplated and will be followed.

> *Richards* v. *Wiener Co.*, 145 App. Div. 353, affd. 207 N. Y. 59.
> *Burn* v. *Lee*, 156 Cal. 221, 229.
> *Cheerbrough* v. *Conover*, 140 N. Y. 382.

(b) *Not only have the defendants failed to prove an invalid agreement as the basis of this action, but the record shows unmistakably that there was no taint of illegality in the arrangement between the parties.*

The utter incongruity of petitioners' theory as to the legal effect of a failure to find as requested, which is considered at pages 57 to 60, *infra*, is indicated by the discussion on pages 26 and 28 of Petitioners' Brief. There reference is made to Defendants' Proposed Findings 15 and 16 (*Rec., p.* 95). These were "Refused" by the Referee. Upon this refusal is based the astonishing argument that by inevitable inference the Referee found as a fact the very propositions which he disapproved, and upon this wild theory the claim is sought to be substantiated that the agreement between plaintiff's assignor and petitioners was one conferring upon him "complete domination, control and direction" over the bankruptcy proceedings, that all fees received by the petitioners were to be held on his account, and that the petitioners were to abdicate as counsel for the trustees and to substitute Mr. Untermyer in their place, giving him the direction, control and supervision of such counsel, the respondents acting merely as his representative to represent the interests of his client.

This is an astonishing distortion of the facts as found, and merely illustrates how the entire record is sought to be garbled in order to interpret as an evil thing the express purpose of the parties, which was actually intended to redound to the benefit of every creditor and to prevent a preference of any of them over another. Petitioners' Brief (*p.* 16) unconsciously describes this kind of reasoning in the phrase: "The extent of the load of possibilities for evil is limited only by the exuberance of one's imagination." This is followed by alleged examples which have no more pertinence to the case disclosed by the record than would the unsubstantial fabric of a dream.

It is for this reason that, in order to limit these imaginative flights, we rest entirely upon the Referee's Findings

of Fact, which rejected the fancies, as well as the testimony, by which the petitioners sought to overthrow their contract.

Petitioners rely on three cases—*Fried* v. *Danziger*, 120 App. Div. 604; *Marsell* v. *Maires*, 203 App. Div. 646, affd. 236 N. Y. 516, and *Maguire* v. *Corvine*, 101 U. S. 108. We proceed to a consideration of these decisions.

(1) *Fried* v. *Danziger* (*supra*) differs from the present case *toto coelo*. There the firm of Danziger Brothers brought an action for a dissolution of the co-partnership. Henry Danziger, Jr., a *son* of one of the members of the firm, appeared for the plaintiff in the action. One Frank was appointed temporary receiver of the co-partnership assets and appeared by Baker & Schwartz, his attorneys, Schwartz *being also related to the parties to the action*. The plaintiff, representing various creditors of Danziger Brothers, caused a petition in involuntary bankruptcy to be filed. The co-partners appeared *and an adjudication followed*. The defendant, the attorney in the co-partnership action, and Schwartz, on behalf of the temporary receiver, proceeded to negotiate with the *plaintiff, after the adjudication in bankruptcy, to secure a discontinuance of the bankruptcy proceedings*, with the result that an agreement was entered into whereby the bankruptcy proceedings were to be discontinued *and Baker & Schwartz and Danziger were to proceed with the action previously brought for the distribution of the partnership assets*. It was part of the agreement that of the costs and allowances obtained by them in the action, 80 per cent. was to be paid to the plaintiff and 20 per cent. was to be retained by the attorneys in the equity suit. The terms of the agreement were carried out, the business of the partnership was liquidated, the creditors received less than 7 per cent. of their demands, *while the attorneys received upwards of $8,000 out of a total of $32,000 realized from the assets. The plaintiff claimed that he was to share the fees received by him with a number of creditors who were his clients.*

Analyzing the transaction, Mr. Justice Spring said:

"The other creditors were not cognizant of the preferential plan by which the creditors represented by the plaintiff were likely to receive a large percentage, while they would get a pittance of their claims. The attorneys for the receiver and Danziger assented to this agreement. *They desired at all hazards to control the administration of the insolvent estate. The Danzigers and Schwartz, the attorney for the receiver, were related, and the apparently complicated affairs of the co-partnership could be managed more in accord with their wishes if they were in entire joint control.* The conclusion is a reasonable one that the plaintiff took advantage of this desire, and as a condition of discontinuing the bankruptcy proceeding compelled a liberal exaction of Danziger and Schwartz. Notice was served on all the creditors of the insolvents of the discontinuance of the proceeding. *There is nothing, however, to indicate that these creditors, aside from those who were to gain preferentially, knew of the terms of the agreement, or were aware that some creditors were to receive indirectly a greater proportional share of the assets of the firm than the creditors who were not favored by being clients of the plaintiff.* • • •

There is, however, another element in the agreement which we believe is against public policy and in contravention of the just administration of the rights of the litigants by the courts. The parties to this agreement were all lawyers. Their arrangement was not that a specified sum or a definite proportion of the assets of the firm should be paid to the creditors who abandoned the bankruptcy proceeding. The pith of their agreement was that Danziger and Schwartz should continue the action for dissolution of the copartnership and obtain allowances from time to time by orders of the court, and of these allowances eighty per cent. should be paid to the plaintiff. • • • *In effect the agreement was that Schwartz and Danziger, the one representing the receiver and the other his relatives, the insolvent debtors, were to join together to procure as large allowances as possible, and then distribute them in accordance with the agreement.*"

The Court then quotes a letter from Danziger to plaintiff's representative, in which he says:

> "I believe it will be impracticable to ask for any allowance at the time of the hearing of this motion. *There is no doubt to my mind that some creditors will be represented in court. The estate in itself does not make the best of showings, and if on top of the argument over settlement comes a request for allowances, while I have no doubt it would be granted, still I think the amount would be materially affected. There is nothing that requires us to make this application on notice, and it is certainly for our best interests that the application be made to the judge in Chambers, and when the circumstances are most favorable to ourselves.*"

Commenting on these facts, Mr. Justice Spring continues:

> "*The scope of the agreement to us is convincing proof that it was expected by the parties to it that Schwartz and Danziger were to endeavor to swell the award for costs and services to the fullest extent.* The temptation to make undue efforts in this direction was manifest when they were to get only one-fifth of the sums realized. If the judge who granted the allowances had known of this agreement he would probably have insisted on a careful scrutiny of the sums asked for, and would have also required the creditors to be represented, and their assent procured to the agreement made by these attorneys."

In that case there was a palpable conspiracy between the parties to the arrangement to take advantage of the creditors, to exploit the estate for their own benefit and the benefit of preferential creditors at the expense of the general creditors.

In the present case the findings are convincing that neither the plaintiff's assignor nor the defendants had the slightest idea of swelling the amount of the fees allotted to the defendants, of giving any preference to any creditor, or of doing aught which would to the slightest

extent militate against the interests of any creditor. On the contrary it is shown that the sole desire was to protect the interests of all creditors.

(2) Petitioners lay great stress on *Marsell* v. *Maires*, 203 App. Div. 646, aff'd 236 N. Y. 516. An analysis of that decision will demonstrate that there is nothing in common between its facts and those now under consideration.

It there appeared that an involuntary petition in bankruptcy was filed against the Franklin Brewing Company about January 23, 1917, and that prior to that date the plaintiff was its attorney and was familiar with its affairs and the names of all of its creditors. It was then alleged:

> "*That thereafter the defendant herein requested plaintiff to assist him in electing and having appointed certain trustees of the said bankrupt corporation, and to thereafter aid in procuring the appointment of the defendant as attorney for said trustees* and to assist the said defendant in the event of his appointment as attorney for said trustees in all matters of litigation which he might be called upon to do by the said *defendant, and said defendant agreed with plaintiff herein that in the event of such appointment as aforesaid as attorney for the said trustees*, that he would pay to the plaintiff herein one-third of any and all fees and allowances that might be awarded to and received by him for his services as attorney for the said trustees."

It was further alleged that thereafter "the plaintiff herein used his efforts and assisted in procuring the election and appointment" of certain designated trustees, one of whom was the defendant's son, and that plaintiff urged upon such trustees the appointment of the defendant as their attorney, and that thereafter the defendant was duly elected and appointed attorney for the trustees.

Commenting on these facts, Mr. Justice Young said:

> "Clearly, the purpose of the agreement was to procure the election of certain trustees, *whose primary and controlling qualification was that, when*

elected, they would appoint defendant their attorney to conduct the litigation of the estate. * * * The agreement in question, if at all effectual, tested the fitness of the trustees, whose election was to be procured, *not by their qualifications as being men of intelligence, honesty and integrity, who would act solely in the interests of the creditors by whom they were elected, but the paramount and controlling consideration was that such trustees, and only such, would be elected, who would appoint the defendant their attorney. Otherwise, the agreement was meaningless. Plaintiff's compensation for the services to be rendered depended upon the accomplishment of that result. In other words, in order to earn such compensation, he must obtain two things: (1) Election of trustees who would appoint defendant their attorney; (2) defendant's appointment by them as such attorney. That was the essence of the contract, and, so far as its real purpose was concerned, nothing else was of the slightest importance.* Persons illiterate, dishonest, open to sinister influences or otherwise, might be elected pursuant to the agreement sued on, and if they fulfilled the requirements of that agreement by appointing defendant their attorney, plaintiff's compensation was earned, or at least the contingency which stood in the way of his obtaining such compensation was removed."

Here, respondent's assignor was not requested to assist the defendants in the election of trustees for Thompson or to procure the defendants' appointment as attorneys of the trustees; nor was there any purpose or intent on his part to do aught that would interfere with the rights and interests of Thompson's creditors or to foist upon them either trustees or attorneys who were actuated by any other consideration than that of the best interests of the creditors. In order that the ruling in *Marvell* v. *Maires* shall be applicable to the facts in this case, it would have to appear that the respondent's assignor and the defendants were both engaged in a scheme the paramount and controlling element of which was the election of only such trustees as would appoint the defendants as their attorneys, and that that scheme was carried into effect. No such purpose existed.

Every factor which led the Court to condemn the agreement which was sought to be enforced in *Marsell* v. *Maires* is absent here. In fact, whatever transpired between the respondent's assignor and the defendants fully conforms with the test laid down by Mr. Justice Young (203 App. Div. 646):

> "It is also true that they (the trustees) serve the interests of the creditors of the particular estate for which they are elected. In a broad sense the public is interested in securing the election of properly qualified trustees so that the due and proper administration of each estate shall be had solely for the benefit of those interested, and free from every other consideration. That this is the policy of the law is, I think, beyond dispute. We must, therefore, test the agreement between the parties hereby determining whether or not it is consistent with that policy."

The facts as found by the Referee show clearly and conclusively that neither of the parties in their relations, contemplated or actual, was moved by any idea other than that of subserving the interests of the creditors, and that nothing occurred which could be tortured into an arrangement which is the equivalent of that which fell within the ban of judicial displeasure in *Marsell* v. *Maires*. Mr. Untermyer was solely interested in the welfare of the creditors of Josiah V. Thompson. He was the counsel for a creditors' committee which was created about eighteen months before the institution of the bankruptcy proceedings. That committee represented approximately 95 per cent. of all of the unsecured creditors of Thompson and $14,000,000 of claims out of a total indebtedness of $15,000,000. A receiver had been appointed in the Court of Common Pleas of Pennsylvania in an attempt to conserve the assets of Thompson for the benefit of his creditors. The Supreme Court of Pennsylvania, however, in *Hodgsett* v. *Thompson*, 258 Pa. St. 85, decided, in 1917, that under the chancery practice of that State there was no authority for such a receivership. It thereupon became apparent that, in order to prevent the property from

being sacrificed and absorbed by the secured creditors, the only hope of protecting the unsecured creditors was by instituting bankruptcy proceedings.

Acting, therefore, solely in the interest of the creditors and for the purpose of conserving the assets, out of which alone they could expect payment, Mr. Untermyer reached the conclusion that their only hope depended upon the institution of bankruptcy proceedings, which would enable the United States District Court to administer the assets of the bankrupt for the benefit of *all* the creditors. He brought these facts to Mr. Weil's attention and requested him, in the interest of the creditors, to institute bankruptcy proceedings, and to that end to take the necessary steps to procure the adjudication and to prevent the property of the bankrupt from being dissipated and frittered away; as it would have been but for the institution of these proceedings. He indicated what he regarded to be the limit of compensation which Weil ought to receive for the services which were in contemplation, and the latter, recognizing the fact that this business came to him through Mr. Untermyer and that 95 per cent. of the unsecured creditors of Thompson were represented by the committee for which Mr. Untermyer was counsel, expressed his readiness to accept for his services in the proceedings which were to be instituted whatever sum Mr. Untermyer would regard as proper.

Weil represented no creditors; his services were not essential to the carrying out of the plan of the creditors' committee. Mr. Untermyer himself might have instituted the bankruptcy proceedings. It was, however, regarded convenient to have local counsel. It was necessarily understood that Mr. Untermyer would, wherever it was deemed desirable, co-operate with Weil, because of the fact that 95 per cent. of the unsecured creditors were represented by him, and that he would studiously follow and keep in touch with the proceedings and advise Weil with regard to them solely in the interest of all the creditors in whose protection he was deeply concerned.

To contend that such an arrangement is contrary to public policy, or that it comes within the decision in *Marsell* v. *Mairs*, or any similar case, is to disregard the express findings of the Referee. It cannot be seriously asserted that the arrangement made, to the remotest degree, approached that condemned in *Marsell* v. *Mairs*. Had there been such an arrangement, it must have preceded the appointment of the trustees and the designation of Weil as counsel. Every fact found contravenes such a theory.

That the trustees were chosen and that Weil was made one of their counsel without any action on the part of the respondent's assignor, further negatives the idea of an illegal contract to bring about the selection of Weil as counsel for the trustees.

(3) Nor is *Meguire* v. *Corwine*, 101 U. S. 108, on which defendants rely, in point. There it appeared that the plaintiff, Meguire, was in the service of the United States Treasury Department, which had designated him to select special counsel in the so-called "Farragut Prize Cases" which only restricted him to the selection of a man who was familiar with admiralty practice. He entered into a contract with Corwine whereby in consideration of his procuring Corwine's appointment as special counsel, the latter agreed to pay Meguire one-half of the fees which he might receive from the Government. This practically amounted to the sale of an office; a flagrant breach of Meguire's special duty as well as a breach of trust.

There is no parallelism in any respect between that case and the present.

(c) *Courts will not lightly condemn a contract as contrary to public policy. Such a defense is carefully scrutinized and can only be based on proof susceptible of no other than a malign interpretation.*

In *Hyams* v. *Stuart King* (1908), Kings Bench Div. 696, 710, Sir Gorell Barnes said:

> "It is necessary to avoid confusion between judicial and legislative functions, and although

there have been cases from which it would seem as if an almost unlimited right had been claimed by deciding cases according to the Judges' views of public policy for the time being, there is now more precision in dealing with questions of public policy. The doctrine by which contracts are held void as being against public policy must be applied with caution, and care must be taken not to lay down new principles of public policy without sufficient warrant. I will only refer to Lord Bramwell's judgment in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1892), Appeal Cas. 46, where he says: 'The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal.' 'Public policy,' said Burrough, J. (*Richardson* v. *Mellish*, 2 Bing. 229, 252), I believe quoting Hobart, C. J., 'is an unruly horse and dangerous to ride.' I quote also another distinguished judge (more modern), Cave, J., 'certain kinds of contracts have been made void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as exponents of what is called public policy.' I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?"

In the same case Lord Justice Farwell said (p. 727):

"The doctrine of public policy is regarded nowadays as one rather for the legislature than the courts, although the courts will not shrink from acting on it if the contract sought to be enforced leads to immorality or crime."

See also the language of Lord Halsbury in *Janson* v. *Driefontain Consolidated Mines, Ltd.*, 1902, App. Cas. 484, and of Baron Parke in *Egerton* v. *Lord Brownlow*, 4 H. L. Cas. 123.

(d) *There was nothing illegal in the agreement between the plaintiff's assignor and the defendants, whereby it was left to the determination of Mr. Untermyer as to what compensation the defendants were to receive, out of the allowance made to them by the Court, for the services rendered, especially in view of the fact that he actively collaborated with the defendants in the interest of the creditors and that as found by the Referee he was the person most conversant with the very complicated affairs of the bankrupt from the legal aspect* (*Rec., p.* 111, *fol.* 108).

Weil, as the appointee of the trustees, represented the creditors of the bankrupt, the trustees themselves acting for the creditors and the proceedings having been instituted for the benefit of the creditors.

In re Gordon Supply & Mfg. Co., 129 Fed. Rep. 622.

In re Hanson, 156 Fed. Rep. 717.

It goes without saying that a trustee in bankruptcy has the right to employ counsel where legal advice is necessary for the performance of his duties.

In re Stotta, 93 Fed. Rep. 438.

In re Abram, 103 Fed. Rep. 272.

In re Baber, 119 Fed. Rep. 520.

In re Champion Wagon Co., 193 Fed. Rep. 1004.

1 *Remington on Bankruptcy* (2nd ed.), pp. 714-721.

Indeed, it has been held to be error for a referee in bankruptcy to permit the creditors by a majority vote to select the attorney for the trustee, the right to make such selection being in him, subject only to control by the Court.

In re Columbia Iron Works, 142 Fed. Rep. 234.

The relations between trustee and counsel are merely those of client and attorney.

In re Abram, 103 Fed. Rep. 273.

There is no statutory restriction upon the power of the trustees to employ counsel, the generally accepted doctrine being, however, that the trustee shall not as a rule employ as counsel those who have represented or are representing adverse interests, as, for example, the bankrupt or his family. Here Mr. Untermyer had represented the creditors only, the same creditors who were represented by the trustees.

In *Keyes* v. *McKerrow*, 180 Mass. 261, it was even held that where there are no conflicting interests between the bankrupt and the trustee in bankruptcy, a contract between an attorney and such trustee for services in collecting debts due the bankrupt estate is not against public policy so as to prevent the attorney's recovery of a fee paid into court by the bankrupt on making a composition with creditors for services rendered to such bankrupt.

In other words, where no actual conflict is shown to exist it has not been regarded as inconsistent for the attorney for the trustee to represent the bankrupt as well. But no such feature exists in the present case.

In the absence of any finding showing adverseness of interest, it will not be presumed that the interests of part of the unsecured creditors are adverse to the other unsecured creditors.

In this connection, attention is directed to the 9th finding contained in the Referee's report (Rec., fol. 168, p. 111), namely, that the trustees in selecting the defendants (petitioners) as their counsel realized that they were selecting for that position counsel of the committee of creditors, who were represented by plaintiff's assignor and knew of defendants' connection with plaintiff's assignor in relation to such creditors and to the further fact that with this knowledge the allowances in question were made to the defendants.

The general rule with respect to the payment of fees to the attorneys for the trustee was laid down in *In re Byerly*, 128 Fed. Rep. 637, where it was said:

> "There is no direct provision in the Bankruptcy Act for the payment of the fees of attorneys em-

> ployed by the trustee, but they come in as part of the administration of the estate like other necessary expenses."

To the same effect, see *Page* v. *Rogers*, 149 Fed. Rep. 194; 211 U. S. 575, 581.

In re Smith, 203 Fed. Rep. 369, decided by the Circuit Court of Appeals for the Sixth Circuit in 1913, holds that the general rule that a receiver should not employ the attorney of either party to the suit in which he is appointed applies to trustees as well, but that it is only when the trustee is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. Judge Knappen said that where it had been the general practice in the district to permit the attorneys for the petitioning creditors or the attorneys for other creditors to act as attorneys for the trustee, except in cases where such attorneys represented interests adverse to those of the general creditors, the fact that the attorneys for the trustees represented certain creditors as well whose interests were not directly adverse or hostile to the general estate, did not disqualify them from representing the trustee so as to preclude an allowance for their services out of the estate. He also held that in the absence of a special finding and direct proof from which it appeared that the attorneys for the trustee had stipulated for their employment by the trustee in advance of his appointment, the Court of Appeals on review could not notice an objection to an allowance for the attorney's services to the trustee on that ground.

In the instant case, no such question could have arisen, by reason of the fact that no objection was at any time raised to the appointment of defendants.

In this connection, Judge Knappen says:

> "The question here concerns only claimant's right to compensation for services actually rendered so far as appears without protest by any creditor to the Court (either Referee or Judge) against the

> propriety of claimant's representing the trustee. Petitioner seems to have contented herself with protesting to the trustee * * *. We may remark in passing that if it was improper for claimants to contest Mrs. Smith's claim, it was likewise improper for Mrs. Smith's attorneys to contest the Holmes claim. The original question of propriety does not wholly depend upon whether or not compensation from the estate is asked * * *. In the absence of a rule or decision distinctly forbidding it, it would be unjust to put such a rule into effect and give it a retroactive effect."

Collier (p. 804) in discussing the employment of the attorney for the trustee and his compensation, says:

> "An attorney's right to compensation is incident to his employment. Whether it shall be paid out of the assets of a bankrupt estate is the question considered here."

In re Coney Island Lumber Co., 199 Fed. Rep. 197, Judge Chatfield said:

> "If more than one attorney or set of attorneys rendered these services, there shall be a division of the fee rather than duplication or multiplication. Hence, if one set of attorneys act for the petitioning creditors and are succeeded by others, or if the court sees fit or deems it necessary to allow some of the services on behalf of the petitioning creditors to be rendered by other attorneys, this will result in a division of the allowance and not increase its amount * * *. No attorney should be allowed to receive compensation for work not done by him but by some one else in his place under a too strict interpretation of the statute, nor should the amount of the allowance be increased to satisfy all the parties at the expense of the estate."

Remington says:

> "The statute is not directed against the *employment* of more than one attorney but against the allowance of more than one reasonable attorney fee" (Vol. II, p. 1979).

The petitioners claim that Rule V of the Rules of the United States District Court for the Western District of Pennsylvania forbade the arrangement made between the petitioners and respondent's assignor (*Rec., p.* 94).

That rule, however, has no possible relation to the subject. It merely provides:

> "Unless specially authorized by the Court, receivers and trustees in bankruptcy shall not retain *as their attorney*, the attorney of the bankrupt, of the petitioning creditors, of the persons applying for the appointment of a receiver, or of any creditor, and that the trustees shall not retain *as their attorney*, any attorney who has obtained proxies or voted upon the election of such trustees, or who is an attorney for persons holding such proxies."

It is not claimed that the respondent's assignor was appointed or retained as attorney by the trustees, or that he obtained proxies or voted upon the election of the trustees, or that he was the attorney for persons holding such proxies. Mr. Weil was retained as attorney by the trustees and his designation was undoubtedly authorized by the Court, for it made allowances to him for the services rendered to the trustees in the bankrupt estate. There is not a word in the rule which in any way restricted him in the choice of those who might assist him professionally and in an advisory capacity in the performance of his duties. It would be farcical to say that he was bound to forego the collaboration of the person most conversant with the conditions affecting the rights and interests of the creditors, or to suppose for a moment that the trustees or the Court would ignore the advantages flowing from such co-operation and watchfulness.

Referring to this rule, Judge Manton, speaking for the Circuit Court of Appeals (*Rec., p.* 180), said:

> "The purpose of Rule V and of the rule of the Supreme Court [which will be presently referred to] was not to prevent such employment. It was

> designed to avoid attorneys actively searching for professional employment in bankruptcy proceedings at their inception and later obtaining their assignment as attorneys for trustees. It was an abuse which sprang from such professional conduct which gave rise to the rule. At no time was an allowance made by the court to Mr. Untermyer, who came within the provisions of Rule V if he applied to the court for compensation. As stated, the finding below is that the defendants below realized that when they were agreeing with Mr. Untermyer for his services, they were consulting counsel for the committee of creditors and knew of his connection in relation to such creditors. His services were accepted; no objection was made to them when tendered. * * * At no time did Mr. Untermyer seek compensation from the bankrupt's estate for services rendered and thus come within Rule V or the General Orders of Bankruptcy promulgated by the Supreme Court."

The General Order in Bankruptcy, promulgated on April 13, 1925 (267 U. S. 614, 615), relating to the compensation of attorneys, receivers and trustees, was referred to by petitioners in the Court below. It is, of course, not retroactive. Nor has it any bearing here. It merely provided that *every attorney* seeking an allowance of compensation *from a bankrupt estate* for services rendered, shall file with the Referee a petition under oath, setting forth certain facts. The petition "is to be accompanied by an affidavit of the applicant, stating that no agreement had been made directly or indirectly and that no understanding exists for a division of fees *between the applicant and the receiver, the trustees, the bankrupt, or the attorney of any of them.*" In the absence of such petition and affidavit no allowance of compensation is to be made.

The respondent's assignor was not the receiver, or the trustee, or the attorney for the receiver or the trustee or the bankrupt. Consequently a transaction such as that now under review does not come within the scope of the General Order. It follows that there is nothing either in

the Bankruptcy Act or in the General Orders to prevent an attorney for a trustee from making any disposition that he desires of his fees and to divide them with any person not expressly excluded.

The sole interest of the plaintiff's assignor was that of the unsecured creditors. They did not represent the bankrupt, or any interest inconsistent with that of these creditors. Consequently there was a complete identity of interest, in so far as these bankruptcy proceedings were concerned, between the plaintiff's assignor and the defendants. It was, therefore, not only proper, but commendable, that they should co-operate and collaborate. Even though the defendants were the appointees of the trustees, they had the right to dispose of the compensation which they were to receive for the services rendered to the trustees in the course of the administration of the bankrupt's estate, in any way that they might see fit, and to avail themselves of the assistance of other counsel so long as the latter did not represent inimical interests and were united in the purpose of securing the best possible results for the unsecured creditors. The defendants had the right to take into consideration the fact that it was through the plaintiff's assignor that it was possible for them to be brought into contact with these bankruptcy proceedings, and that it was due to the confidence bestowed upon them by the plaintiff's assignor that they were enabled to carry on this lucrative piece of business. They likewise had the benefit of the exceptional familiarity with the bankrupt estate, the experience and advice of plaintiff's assignor and of his knowledge of the negotiations conducted by the creditors' committee for the advantageous sale of the bankrupt's assets for the benefit of his creditors. Indeed, it was these negotiations which finally culminated in the conveyance by the trustees of the bankruptcy's property to the great advantage of the creditors.

It is not pretended that there was any intention or understanding that the defendants were to make any charge against the trustees for a penny in excess of the value of the services which they rendered, or that they

in fact increased their charge in consequence of any arrangement or understanding with the plaintiff's assignors. It was, therefore, entirely proper and in accordance with the general custom prevailing among lawyers of high standing under like conditions, that the fees realized by the defendants out of this business were to be divided between the plaintiff's assignors and the defendants on the basis of the determination of Mr. Untermyer.

That such division of fees is lawful is expressly provided in subdivision 2 of Section 274 of the New York Penal Law, where, after forbidding certain acts by attorneys or counselors, out of abundance of caution it is declared:

> "But this subdivision does not apply to an agreement between attorneys and counselors, or either to divide between themselves the compensation to be received."

Matter of Fitzsimmons, 174 N. Y. 15.
Scolaro v. *Ash*, 137 App. Div. 667.

The validity of such agreements has been taken for granted in many cases.

In *White* v. *Polhamus*, 1 New York City Court 421, it was held that an agreement between two attorneys that if one would assist the other who was the salaried attorney of a corporation the salary would be divided between them, was valid.

It has likewise been held that the fact that one of the attorneys does substantially all the work will not entitle him to more than the agreed proportion where the other is ready and willing to serve whenever called upon.

Owen v. *Dudley*, 217 U. S. 488.

It is immaterial whether the client knew of the contract between the attorneys or not or whether he had any connection with it.

Arcock v. *Baker* (Tex.), 60 S. W. Rep. 273.

A general custom as to a division of fees between lawyers exists and has been enforced by the courts.

Parker v. *Gartside*, 178 Ill. App. 634.
Ford v. *Freeman* (Cal.), 180 Pac. Rep. 545.
Gill v. *Mayne* (Iowa), 162 N. W. Rep. 24.
Underwood v. *Overstreet*, 223 S. W. Rep. 152.
Smith v. *Waldrop*, 77 So. Rep. 331.

In *Candler* v. *Candler*, Jacobs, 225, Lord Chancellor Eldon held that an agreement by an attorney to pay a share of the profits of his business to another person, even though not an attorney, was not illegal.

It is true that under the law of New York the right to such division is confined to an agreement between attorneys. Yet this adjudication is valuable as indicating that it was not regarded as *malum in se* to enter into such an agreement. There it was sought to be claimed, under a statute, that such an arrangement was not lawful, but the Lord Chancellor said:

> "I should state that this statute, if the construction be such as is contended for, has been violated over and over again by the best men in the profession. It has happened to me to know that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that consistently with the policy of the law agreements could not be made by which they could contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill or knowledge in their profession, but for a sum of money paid in advance. I knew that this would rip up many transactions, and I was happy that the Court of Kings Bench was of a different opinion, though I never could entirely reconcile myself to their doctrine."

The case to which he refers is *Bunn* v. *Guy*, 4 East 190, which involved a contract entered into by a practicing attorney to relinquish his business and to recommend his

clients to two attorneys for a valuable consideration. The Lord Chancellor referred this question for opinion to the Court of Kings Bench, where the Court, consisting of Lord Ellenborough and Justices Grose, Lawrence and LeBlanc, certified that the contract was good in law.

In *Watkins* v. *Sedberry*, 261 U. S. 571, it was held that a contract between an attorney and the trustee of a bankrupt estate, whereby the former undertook to recover property belonging to the estate and indemnified the trustee against damages and expenses, and the trustee agreed that any property so recovered should be chargeable with the expenses incurred by the attorney and the balance was to be equally divided between them, although on its face unenforceable, was not *malum in se*, and that the attorney was not thereby debarred from recovering on a *quantum meruit*. In that case the bankrupt objected to the allowance on the ground of champerty. The Court, however, made short shrift of the objections made to the allowance of compensation for the services rendered.

Here the amount received by the defendants out of the bankrupt estate was allowed by the court. At *Rec., p.* 112, *fol.* 170, it was found by the Referee that "*a substantial part of the services for which said allowances were made*" had "*been performed by plaintiff's assignor and by Guggenheimer, Untermyer & Marshall acting for him.*" It is not pretended that the amount allowed by the Court to the petitioners exceeded the reasonable value of the services rendered. There is nothing to show that it was contemplated that the charges made were in any way to swell the expense of the administration of the estate. The fact that the plaintiff's assignor represented so large a proportion of the creditors was an earnest that no excessive payment would be sanctioned. The petitioners unquestionably had the right to divide the allowances made to them with a lawyer whose services were called into requisition and who was specially qualified to render valuable service by the fact that he was the person most conversant with the bankrupt's affairs.

The services for which compensation was awarded, which included those of the plaintiff's assignor, all inured to the benefit of the estate and were unitary. The findings of the Referee show that nothing was concealed from the trustees in bankruptcy, for it is found at folio 168, page 111, that the latter "in selecting the defendants as their counsel realized that they were selecting for the position counsel of the committee of creditors, who were represented by plaintiff's assignor, and knew of the defendants' connection with the plaintiff's assignor in relation to such creditors."

It does not, therefore, lie in the petitioners' mouths to contest the validity of the agreement which they made with plaintiff's assignor, nor would a court of its own motion prevent the fulfilment of the equitable agreement on which this action is based.

III.

The contract sued upon is neither vague nor indefinite in its terms. It was left to Mr. Untermyer to determine how the fees allowed to the petitioners were to be divided. His determination that the respondent's assignor should have 40 per cent. and the petitioners 60 per cent. of these fees is controlling, there being no pretense of bad faith.

The fact that the respondents' assignor was interested in the division of the amount allowed by the Court to the petitioners, in no manner affected the validity of the division.

In *Goltra* v. *Weeks*, 271 U. S. 536, 547-549, the question related to the termination of a lease by the lessor, the chief of engineers, for non-compliance by the lessee with the terms of the contract. In the course of the opinion Mr. Chief Justice Taft said:

> "*Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party*

to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive. There are many cases where the contract makes the satisfaction of one of the parties in respect of compliance the condition precedent to fulfillment, and good faith is all that is required to justify rejection of work or product tendered."

The cases referred to in the foregoing quotation are those which have enforced provisions contained in contracts for the erection of a building or for the construction of a railroad to the effect that performance shall be to the satisfaction of the architect or engineer or of the person or corporation for whom the work is done. They likewise include the familiar decisions which leave it to the determination of one of the parties to a contract as to whether or not the work done by the other in alleged performance of it has been completed to his satisfaction

Kihlberg v. *United States*, 97 U. S. 398.
Sweeney v. *United States*, 109 U. S. 618.
Chicago, S. F. & Cal. R. R. Co. v. *Price*, 138 U. S. 185.
Repley v. *United States*, 223 U. S. 695.
Rush v. *Jones*, 144 Fed. Rep. 942, 947.
Cope v. *Beaumont*, 181 Fed. Rep. 19.
J. H. Sullivan Co. v. *Wingerath*, 203 Fed. Rep. 460.
Robinson v. *United States*, 251 Fed. Rep. 461.
Thompson-Starrett Co. v. *La Belle Iron Works*, 17 Fed. (2nd) 536, 541; certiorari denied, 274 U. S. 748.
Payne v. *Roberts*, 214 Pa. St. 546.

This principle has been applied in a variety of cases.

In *Heyman Cohen & Sons, Inc.*, v. *M. Lurie Woolen Co., Inc.*, 232 N. Y. 112, the defendant entered into a contract to furnish specified merchandise to plaintiff, which further provided that *plaintiff* is given the "privilege * * * to confirm more of the above if (the defendant) can get more." It was held that the implication was plain *that the buyer was to fix the quantity* subject only to the proviso that the quantity shall be limited by the ability to supply. *In that case the buyer was the plaintiff.* Yet it was held that he could determine the quantity of merchandise to be supplied.

In *Moritz* v. *Eisner & Sons, Inc.*, 249 N. Y. 100, effect was given to a contract under which an employee was entitled to receive at the end of the period for which he was employed 10 per cent. of the net profits made during such period in a specified branch of the employee's business which made the employers "the sole arbiters to pass on and determine" "any differences of opinion" that should arise "as to the determination as to such net profits."

In *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 38 N. E. 432, it was held that the contract between a stockholder and the corporation of which he was a member providing for the transfer of the stockholder's stock to the corporation *at a price to be fixed by the directors*, was valid. The Court said:

> "It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, *even though the party establishing it was interested;* provided the interest was known, and no objection made by the parties, *and no fraud or bad faith is shown.* Brown v. Bellows, 4 Pick. 179, 189; Palmer v. Clark, 100 Mass. 373, 389; Haley v. Bellamy, 137 Mass. 357, 359; Fox v. Hazelton, 10 Pick. 275; Strong v. Strong, 9 Cush. 569; Benj. Sales (6th Am. ed.), § 88, note 3."

See also:

Matter of Fletcher, 237 N. Y. 440.

Nor is there legal objection to a contract whereby it is left to the determination of one of the parties as to how a certain fund is to be divided. By this course the parties have provided a method whereby that which might otherwise be indefinite and uncertain is made definite and certain.

Jones v. *Roberts*, 113 App. Div. 285, aff'd 189 N. Y. 497.

Miscellaneous Precedents Upholding Contracts as Sufficiently Definite.

Attention is directed to the following contracts which were held to be sufficiently definite, all of them proceeding on the principle *id certum est quod certum reddi potest*:

A contract to purchase what the buyer required in his business.

Church v. *Proctor*, 66 Fed. Rep. 240.

A contract to purchase buyer's entire consumption of phosphate rock.

Loudenback Fertilizer Co. v. *Tennessee Phosphate Co.*, 121 Fed. Rep. 298.

A contract to buy all quebracho needed for the buyer's factory.

Klipstein v. *Allen*, 123 Fed. Rep. 992.

An agreement to take care of the buyer's needs for the year.

T. B. Walker Mfg. Co. v. *Swift*, 200 Fed. Rep. 529.

A contract to buy and sell buyer's "August requirements."

Jenkins v. *Anaheim Sugar Co.*, 247 Fed. Rep. 958.

A contract to buy all iron that the purchaser should use, need or consume in his business.

National Furnace Co. v. *Keystone Mfg. Co.*, 110 Ill. 427.

A contract to purchase buyer's requirements of coal.

Minnesota Lumber Co. v. *Whitebreast Coal Co.*, 160 Ill. 85.

A contract to give buyer's trade.

Warden Coal Washing Co. v. *Meyer*, 98 Ill. App. 640.

A contract to buy all ice which the plaintiff required for his hotel.

Smith v. *Morse*, 20 La. Ann. 220.

A contract to buy all ice which the seller might desire to sell.

Burgess Fibre Co. v. *Broomfield*, 180 Mass. 283.

A contract to buy all wheels that the purchaser might "want" during the ensuing season.

Cooper v. *Lansing Wheel Co.*, 94 Mich. 272.

A contract to buy all ice necessary to carry on the buyer's business.

Hickey v. *O'Brien*, 123 Mich. 611.

A contract to buy all the cans which the purchaser should use in its factory.

Dailey Co. v. *Clark Can Co.*, 128 Mich. 591.

A contract for a shipper's insurance business for a season.

Ames-Brooks Co. v. *Aetna Ins. Co.*, 83 Minn. 346.

A contract to purchase the "necessary brick, lime and cement which I may require at my two jobs."

Miller v. *Leo*, 35 App. Div. 589, aff'd 165 N. Y. 619.

A contract by buyers for "their supply" of certain drugs.

Asahel Wheeler Co. v. *Mendelson*, 180 App. Div. 9.

It will be observed that in most of the cases enumerated it was left to the buyer who sought to enforce the contract to determine what his needs were or how much of the merchandise he required during a stipulated period, and in all of these cases the contracts were held sufficiently definite to permit the person making the requisition to enforce his requirements.

Decisions Relied Upon by Petitioners.

The cases cited on behalf of the petitioners on this proposition have nothing in common with the facts of this case. In each of them the agreement sought to be enforced was palpably indefinite. There was nothing by which the compensation to be paid was determinable. Everything was left to the discretion of the defendant and he did not choose to make any determination as to the compensation to be paid. Here, however, Mr. Untermyer was to determine what the division should be, and he made the determination. It was left to his judgment.

Barker v. *O'Grady*, 163 N. Y. Supp. 594, involved an oral contract with the defendant under which he agreed to make "an equitable division" with the plaintiff of fees received by him. The plaintiff sought a recovery in an action at law. The defendant had made no division and there was, therefore, nothing on which to base a recovery.

In *McDonald* v. *Acker, Merrill & Condit Co.*, 192 App. Div. 123, the defendant agreed to pay "a liberal and very substantial bonus in addition to a stated salary." Here, again, all depended upon the action of the defendant, and it did not act. Had the agreement been one to pay the plaintiff the amount which the plaintiff should determine to be fair and just a different result would have followed.

Canet v. *Smith*, 173 App. Div. 241, involved an agreement "to pay to the plaintiff a reasonable amount from the proceeds to be realized from the sale of merchandise manufactured from (certain) secret processes." No method was provided for determining what was "a reasonable amount."

In *Featherstone* v. *Fowler*, 174 App. Div. 452, the defendant contracted to pay the plaintiff "for his time, his labor and his trouble." No method was provided in the contract for ascertaining the amount to be paid for the time, labor and trouble.

In *Bluemner* v. *Garvin*, 120 App. Div. 29, the defendant agreed that he "would fairly share with plaintiff the commissions received * * * on account of the contract with the City of New York." No method was provided whereby it was to be determined as to how the sharing would take place.

In *United Press* v. *New York Press Co.*, 164 N. Y. 406, the defendant agreed to pay plaintiff "a sum *not exceeding* $300 during each and every week that said news report is received" by the defendant. A sum not exceeding $300 might be nothing, or $1 or $5. Here, again, there was no method provided for determining the amount to be paid.

That this is the correct interpretation of the case just cited appears from the opinion of Mr. Justice Jenks in *Rosbach* v. *Sackett & Wilhelms Co.*, 134 App. Div. 130, where there was a contract of employment for a term of years at a salary "not less than $45 per week." That was held not to be indefinite.

In *Varney* v. *Ditmars*, 217 N. Y. 223, the agreement was: "If you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started that were in the office three years, on the first of next January I will close my books and give you a fair share of my profits." Here, again, there was no method provided whereby the share of profits to which the plaintiff was entitled was to be determined.

The Ruling on Respondent's Thirteenth Request to Find.

Petitioners for the first time have raised a question which was not presented in the petition or brief on the application for writ of certiorari herein, namely, that the Referee in passing on respondent's thirteenth request to find (*Rec., p.* 106), omitted to find those portions of the request which are printed in brackets and that such portions were not found. This request, as it appears in the record is as follows:

> "On being informed of the payments received by the defendants in said bankruptcy proceedings prior to October 28, 1920, the plaintiff's assignor on or about November 15, 1920, pursuant to the aforesaid agreement [and after giving due consideration to the nature and character of the services rendered by the defendants and by himself and by the firm of Guggenheimer, Untermyer & Marshall, acting for him in the aforesaid bankruptcy proceedings], determined [in good faith that a fair and reasonable] the division of the sum of $142,659.98 theretofore received by the defendants as aforesaid, was that the defendants should retain 60% of the said sum received by them and that the remaining 40% should be paid to him, and the defendants were duly notified of such determination and decision [which were in all respects reasonable and equitable and commensurate with the relative services rendered as aforesaid]."

The finding as made by the Referee is Finding 14 (*Rec., p.* 112, *fol.* 170).

The petitioners have treated the ruling of the Referee (which is not presented by any bill of exceptions) as equivalent to a finding (which is not contained in the Report of the Referee) that the action of the respondent's assignor in making his determination as to the division of the moneys received by the petitioners, was not made in good faith, and that the determination was not fair and reasonable and commensurate with the relative services rendered by the petitioners and respondent's assignor.

This contention is not only directly contrary to the Report of the Referee, but is in direct conflict with the authorities.

Thus in *Galle* v. *Tode*, 148 N. Y. 270, it was squarely decided that the refusal to find a fact is not tantamount to a finding against a fact, unless the intention of the Court to be so understood is clearly apparent. That was an action by judgment-creditors to set aside judgments confessed by Tode and Wulling, on the ground of fraud. It was contended that Levi and Materne were parties and privies to the fraudulent intent of Tode and Wulling. There was, however, no direct finding to that effect. A finding was requested that Levi and Materne had no knowledge of the intent of Tode and Wulling to defraud their creditors and the request was refused. The Court of Appeals ruled as stated, adding:

> "The refusal to find may rest upon other considerations; the evidence may not be regarded as satisfactory either for or against, or the fact may not be regarded as material in the determination of the controversy."

In *Morehouse* v. *Brooklyn Heights R. R. Co.*, 185 N. Y. 521, 527, it was claimed that a contract was unconscionable and void. Requests to find were presented and the Court marked them "Refused." Commenting upon that state of the case, Judge Haight said:

> "But, assume that the provisions of Section 1023 of the Code had been re-enacted and were in force,

> and that an exception could be taken to the rulings made upon request and that such exception could be reviewed upon appeal; even then a refusal to find a fact requested is not equivalent to an affirmative finding to the contrary. If it were, a judgment might be based upon a decision made up wholly of refusals, thus completely nullifying the plain provisions of Section 1022 of the Code, which require that the decision must state separately the facts and conclusions of law and direct the judgment to be entered thereon. A judgment, therefore, must be based upon facts found, not facts refused. This precise question was considered by this court in the case of *Galle* v. *Tode*, 148 N. Y. 270-277."

In *Kavanaugh* v. *Commonwealth Trust Co.*, 223 N. Y. 103, 117, an action was brought against a director of a financial institution to recover losses sustained by the company through his alleged neglect of duties. There was no finding of neglect; likewise there was no finding that the losses were not due to the appellant's neglect. The Trial Court, however, refused a request to find that the appellant was negligent and that losses resulted therefrom. From this it was sought to infer that the Trial Court had found that the appellant was not negligent. As to this Judge Crane, speaking for the Court of Appeals, said:

> "But this is not a finding that he was not negligent, or that losses did not result therefrom. * * * A judgment must be based upon facts found, not facts refused."

It is to be observed that in the case now before this Court the request was not made by the petitioners, but by the respondent.

To the same effect is the decision in *Regen* v. *Pettus*, 223 N. Y. 662, 663.

Analogous in principle is the ruling in *United States* v. *Carver*, 260 U. S. 482, 490, where Mr. Justice Holmes said:

> "The denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, as the bar has been told many times."

The omission of the portions of the proposed finding to which reference has been made proceeded clearly on the theory that the question of fraud or bad faith or of reasonableness was not in issue. The petitioners made no such claim, as is indicated by their requests to find, assuming that they are to be considered for any purpose.

In the opinion of the Referee (*Rec., p.* 72) he says:

> "The mere fact that the person who makes the determination is one of the parties to the contract and such interest is known *and no fraud or bad faith is shown* does not limit the power of the court to act."

Again (*Rec., p.* 73, *fol.* 114) the Referee says:

> "So here, the agreement that the amount to be allowed to the defendants was to be as much as Mr. Untermyer should fix, Mr. Untermyer having fixed the amount due, would seem to be enforceable in the absence of fraud or bad faith."

Finally, at *Rec., p.* 74, the Referee, referring to Mr. Untermyer's determination, says:

> "His determination, however, as to the proportion which he was to receive from the $142,659.98 payment seems to be conclusive in the absence of fraud or bad faith, and the Referee cannot say that such a decision, even in view of the fact that he had received other compensation specially allowed on the Piedmont sale to the Creditors' Committee and their counsel, was improper or excessive."

The burden of showing fraud or bad faith or unreasonableness in the determination of the arbiter rested on the

petitioners. It was for them to overcome the presumption of good faith. The testimony given on the trial is not brought up by any bill of exceptions, and no issue of fraud or bad faith on the part of the respondent was presented.

In *Gaines* v. *Nicholson*, 9 How. 356, 364, Mr. Justice Nelson invoked the universal rule that fraud is not to be presumed and that the burden of establishing it rests upon the party who claims it.

In *Jones* v. *Simpson*, 116 U. S. 615, in the course of his opinion, Mr. Justice Harlan remarked:

> "As the trial court stated, 'the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, or for a dishonest or fraudulent purpose takes upon himself the business of showing the same.'"

See also:

> *Farrar* v. *Churchill*, 135 U. S. 615.

In *Demarest* v. *Winchester Arms Co.*, 257 Fed. Rep. 162, 173, the Court said:

> "The universal rule is that fraud is never presumed. The legal presumptions are in favor of honesty and fair dealing. There can be no imputation of fraud when the circumstances and facts on which it is based are consistent with honesty and purity of intention * * *."

In *Long* v. *West*, 31 Kan. 298, 301, Mr. Justice Valentine said:

> "In the absence of evidence to the contrary, honesty and fair dealing in all transactions are always presumed; and if any person claims that there was fraud in any transaction, it devolves upon such person to prove the fraud, and it does not devolve upon the party charged with committing the fraud to prove that the transaction was honest and *bona fide*."

This language applies in the present case *a fortiori* since here there has been no charge of fraud or bad faith in the determination made by the respondent's assignor.

In *Barron* v. *International Trust Co.*, 184 Mass. 440, 68 N. E. Rep. 831, Mr. Justice Braley said:

> "Not only is fraud never presumed, but it must be affirmatively alleged and proved by the party who relies upon it either for the purpose of attack or defense. And nothing appears in the evidence recited in the record to show want of good faith by the defendant. If the plaintiff, in order to avoid the effect of this evidence, sought to charge the defendant or its officers with fraudulent conduct, it became his duty to so allege and offer some affirmative proof to overcome the presumption of fact that they had acted honestly."

It is evident that the Referee proceeded in reliance upon this principle, and it is to be presumed that there was nothing in the record which would have justified him to find affirmatively that there was fraud or bad faith or an unreasonable division.

IV.

It is respectfully submitted that the judgments of the Courts below should be affirmed.

LOUIS MARSHALL,
Respondent's Counsel.